1990

Dolly Plumb v. State of Utah : Brief of Appellant

Utah Supreme Court

Craig G. Adamson; Dart, Adamson & Kasting; Stewart M. Hanson, Jr.; Suitter Axland Armstrong & Hanson; Attorneys for Appellees.
Jackson Howard; Leslie W. Slaugh; Howard, Lewis & Petersen; Attorneys for Appellants.

BRIEF

CKET NO. 900012

IN THE SUPREME COURT

OF THE STATE OF UTAH

DOLLY PLUMB, et al.,	:	
Plaintiffs-Appellees,	:	Case No. 900012
vs.	:	
STATE OF UTAH, et al.,	:	
Defendants.	:	Oral Argument Priority No. 16
MALCOLM A. MISURACA; HALEY & STOLEBARGER; DOUGLAS B. PROVENCHER; and BEYERS, COSTIN & CASE,	:	
Appellants.	:	

BRIEF OF APPELLANTS

APPEAL FROM THE MEMORANDUM DECISION OF THE
THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, UTAH,
THE HONORABLE DAVID S. YOUNG

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LIST OF PARTIES

Plaintiffs

The named plaintiffs in this action are Dolly Plumb, Sheila Bohard, Ron C. Bohard, Steve Rigby, Debbie Rigby, Kenneth Candland, B. Chang, Dao Van Nguyen, Randall Harden, Patti Harden, Lee Fiet, Gary Stratton, H. T. Adams, Albert F. Perschon, Ralph Knudson, Dean Hadfield, Ed Wicks, F. E. Draper, Artemus Little, Naoma Little, Anetta J. Bilger, O'Vernon Cahall, and all other similarly situated; Western Heritage Thrift & Loan, Interlake Thrift & Loan, Copper State Thrift & Loan, and Utah Industrial Loan Corporation.

The State of Utah, although initially defendant, appeared as a party plaintiff in the Third Amended Complaint filed July 31, 1989.

Defendants

The initial named defendants consisted of the following: The State of Utah; George Sutton, as Commissioner of Financial Institutions for the State of Utah; the Department of Financial Institutions for the State of Utah; Elaine B. Weis; Alpine First Financial; Alta Thrift and Loan; American Investment Thrift; Avco Thrift; Basin Loans, Inc.; Capitol Thrift & Loan; Citicorp Person-To-Person; Commerce Financial; Commercial Credit Plan, Inc.; First Security Financial; First Thrift and Loan; Great Western Thrift and Loan; First Charter Savings Bank (Heritage Savings); Foothill Thrift and Loan; Home Credit Thrift & Loan; Model Finance, Inc.; Overland Thrift & Loan; People's First Thrift, Pioneer Thrift; St.

George Thrift & Loan; The Lockhart Company; U.S. Thrift & Loan; United Thrift; Utah Financial Thrift; Valley Thrift and Loan; Watkiss & Campbell; Industrial Loan Guaranty Corporation; Richard A. Christenson; John H. Firmage, Jr.; Robert B. Beckstead; T. Kay Lyman; Richard A. Van Winkle; Irene Jorgensen; Stanley A. Anderson; Dean G. Christensen; Robert L. Lowe; Ed M. Jamison; Russell B. Jex; Charles E. Johnson; Ronald C. Lease; M. D. Borthick; Ed H. Throndsen, Richard D. Paul; Terry Wanter; W. Harold Dobson; Richard J. Robinson; Paul A. Miller; Carl A. Hulbert; John C. Jarman; Fred S. Kohlruss; Larry E. Grant; Larry Hendricks, Larry H. Miller, and Doe 1 through Doe 300.

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BRIEF OF APPELLANTS

JURISDICTION

The Memorandum Decision appealed from was entered October 31, 1989. A Determination of Finality certifying the decision as final pursuant to Utah R. Civ. P. 54(b) was entered on January 2, 1990. Appellants filed their Notice of Appeal on January 2, 1990. This Court has jurisdiction pursuant to Utah Code Ann. § 78-2-2(3)(j) (Supp. 1989).

ISSUES PRESENTED

1. Did the law of the case doctrine prohibit the trial court from modifying its Orders entered on December 5 and 6, 1988, where the Orders were entered after a hearing of which all parties had been given proper notice and an opportunity to be heard, all necessary relevant evidence had been presented to the court, and

the court had been fully briefed concerning the relevant legal issues, and where no new evidence was presented to the court justifying the modification of the prior orders, but where the only claimed justification for modification of the prior orders was the court's reevaluation of the legal arguments which had been previously presented to the court?

This is a question of law to be reviewed by this Court for correctness. See State v. Lamper, 779 P.2d 1125, 1129 (Utah 1989).

2. Was the trial court's award of a total attorney fee of $4.25 million supported by the evidence where the only competent evidence established that the minimum reasonable award was 5.8 million?

Whether the award amount was reasonable is reviewed for an abuse of discretion. If there was no evidentiary support, the reduction is reviewed for correctness. See Dixie State Bank v. Bracken, 764 P.2d 985 (Utah 1988); Regional Sales Agency, Inc. v. Reichert, 784 P.2d 1210, 1215-16 (Utah Ct. App. 1989).

3. Did the trial court err in awarding a fee based in part on the number of hours spent by class counsel ("lodestar analysis") rather than awarding a percentage of the amount recovered?

This presents a question of law to be reviewed by this Court for correctness. See Dixie State Bank v. Bracken, 764 P.2d 985 (Utah 1988).

4. Is weight of the evidence contrary to the trial court's finding that class counsel's court performance does not merit exceptional recognition?

The standard of review is whether the finding is contrary to the great weight of the evidence. See Reid v. Mutual of Omaha Ins. Co., 776 P.2d 896, 899-900 (Utah 1989).

5. Did the trial court err in basing its finding concerning class counsel's court performance on events which occurred subsequent to the work for which attorney fees were awarded?

The standard of review is abuse of discretion. See Bambrough v. Bethers, 552 P.2d 1286 (Utah 1976).

6. Must the decision be remanded where the trial court did not make findings on all material issues sufficient to determine whether the trial court abused its discretion? See Regional Sales Agency, Inc. v. Reichert, 784 P.2d 1210, 1215-16 (Utah Ct. App. 1989).

7. Does a trial court have discretion to appoint a special master to review cost disbursements in class action litigation, where there is no complex accounting to be performed and the only justification for the appointment is the trial court's lack of time to adequately review the matter?

The issue of whether the trial court has discretion is a question of law, to be reviewed by this Court for correctness. See Swainston v. Intermountain Health Care, Inc., 766 P.2d 1059 (Utah 1988) (trial court ruled on discretionary matter based on an erroneous legal premise; reviewed for correctness); Dixie State Bank v. Bracken, 764 P.2d 985, 991 (Utah 1988).

8. Is a trial court's appointment of a special master fatally defective where the court did not enter any findings of fact which would support the conclusion that there existed extra-ordinary circumstances justifying the appointment of the special master?

This is a question of law subject to review by this Court for correctness.

9. If the appointment of a special master was within the discretion of the trial court, did the trial court abuse its discretion in appointing a special master under the circumstances of this case?

The scope of review for this issue is whether the trial court abused its discretion. See Hoptowit v. Ray, 682 F.2d 1237 (9th Cir. 1982).

10. Where the order appointing a special master instructed the special master to review cost disbursements and fee requests to service providers, did the special master exceed the scope of his appointment by undertaking to review the reasonableness of the attorney fees previously awarded by the court?

This is a question of law subject to review by this Court for correctness.

11. Where a special master has apparently exceeded the scope of his initial charge and parties in interest have filed objections to the proceedings of the special master and have requested oral argument on those objections and related motions, did the trial court abuse its discretion in summarily denying the

motions without receiving oral arguments and in sua sponte modifying the order of appointment?

The standard of review is whether the trial court abused its discretion. See Billings v. Brown, 639 P.2d 189, 190 (Utah 1981).

12. Does the trial court have authority to appoint a special master to review the law and to make a recommendation to the court concerning legal issues relative to the award of attorney fees to class counsel in class action litigation?

This is a question of law to be reviewed by this Court for correctness. See La Buy v. Howes Leather Co., 352 U.S. 249, reh'g denied, 352 U.S. 1019 (1957).

13. If the appointment of a special master to make recommendations to the court on legal issues is within the court's discretion, did the trial court abuse its discretion in making such an appointment under the circumstances of this case?

This issue is subject to review for abuse of discretion.

14. Did the trial court abuse its discretion in denying class counsel's motion to strike the reports of the special master and to quash the appointment of the special master, where the uncontroverted evidenced showed that the master has exceeded the scope of his charge, had perceived his role as that of an advocate for the class, had undertaken to take evidence through ex parte contacts with various persons and without holding a hearing or making any record, and in otherwise failing to act as an unbiased judicial officer?

The issue of whether the master's actions were appropriate is a question of law to be reviewed by this Court for correctness. The issue of whether the trial court should have stricken the master's report and quashed the master's appointment should be reviewed by this Court for an abuse of discretion. See Fogel v. Chestnutt, 668 F.2d 100 (2nd Cir. 1981).

15. Is reversal of the judgment required by reason of the trial court's improper delegation of much of the judicial function to the special master, the trial court's frequent ex parte conferences with the special master regarding judicial orders, and the trial court's apparent ex parte contacts with the special master regarding the special master's knowledge gained through the special master's own ex parte investigation?

This issue presents a question of law to be reviewed by this Court for correctness.

16. Were the recommendations of the special master supported by the evidence?

This issue should be reviewed by this Court on a clearly erroneous standard. See Rohde v. K. O. Steel Castings, Inc., 649 F.2d 317 (5th Cir. 1981).

17. Did the trial court err in giving any weight to the report of the special master where that report did not contain any findings or recommendation concerning the factual issues before the court?

The issue of whether the special master was required to make factual findings is a question of law subject to review by this

Court for correctness. The issue of whether the trial court erred in failing to strike the report should be reviewed for an abuse of discretion.

18. Did the trial court abuse its discretion in failing to grant counsel's timely request for postponement of the hearing scheduled for July 17, 1989, where counsel for class counsel was unable to attend the majority of the hearing and was accordingly unable to effectively present his arguments at the hearing?

This issue should be reviewed by this Court for an abuse of discretion. See Christensen v. Jewkes, 761 P.2d 1875 (Utah 1988).

19. Did the trial court abuse its discretion in quashing the subpoenas issued at the request of class counsel for the purpose of presenting testimony at the July 17, 1989 hearing?

This issue should be reviewed by this Court for an abuse of discretion. See Bullock v. Ungricht, 538 P.2d 190, 192 (Utah 1975).

DETERMINATIVE STATUTES

The provisions of Rule 53 of the Utah Rules of Civil Procedure are set forth in the Appendix.

STATEMENT OF THE CASE

A. Nature of the Case. This is an appeal from an award of attorney fees to the attorneys for the plaintiff class in class action tort litigation.

B. Course of Proceedings and Disposition Below. The underlying class action was filed on July 20, 1987. Enabling

legislation to effect a settlement was enacted by the Utah State Legislature on October 4, 1988, and signed into law by Governor Norman Bangerter on October 11, 1988, effective upon the passage of sixty days. The legislation, together with subsequent amendments, is codified at Utah Code Ann. §§ 7-21-1 to -10 (Supp. 1989). After notice to all parties in a form approved by the trial court, a hearing on the settlement and on class counsel's request for an award of attorney fees was held on November 30, 1988. Evidence regarding fees was accepted both by testimony and affidavit.

On December 5, 1988, the trial court issued a Memorandum Decision, and on December 6, 1988, an Order, which, among other things, approved the settlement, awarded class counsel attorney fees of 5.8 million, and appointed a special master, James U. Jensen, "for the purpose of reviewing requests for cost reimbursements . . .," retaining those cost reimbursement requests made by expert witnesses, lobbyists and other under advisement. The course of proceedings after the appointment of the master is set forth in more detail in the Agreed Statement in Lieu of Record on Appeal (included in the Appendix) and in the Argument. The special master ultimately submitted a final report and recommendation on July 14, 1989.

On July 17, 1989, the trial court held a hearing to consider the report of the special master and entertain arguments of counsel. Following the hearing, the court entered a Memorandum Decision on October 31, 1989, which purported to alternatively withdraw all prior orders relating to attorney fees or to amend

them as having been interim orders, and made a reduced attorney fee award to class counsel of 4.25 million dollars.

On November 21, 1989, class counsel filed a Motion to vacate the Memorandum Decision, and simultaneously and in conjunction with the plaintiff depositor class, filed a Motion to disqualify Judge David S. Young based on statements made in the Memorandum Decision and on prior statements. The motion was denied by Judge Scott Daniels at a hearing on December 27, 1989. A formal Order denying the motion was entered January 16, 1990. Appellants subsequently withdrew the Motion to Vacate as being moot.

On December 1, 1989, appellants filed a Motion for a Determination of Finality pursuant to Utah R. Civ. P. 54(b). The motion was granted by Order entered January 2, 1990. Appellants filed their Notice of Appeal the same day.

C. Statement of Facts. The facts relevant to this action are set forth in the Agreed Statement in Lieu of Record on Appeal (herein "Agreed Statement") which appears in the Appendix. Additional facts are set forth in connection with the Argument.

SUMMARY OF ARGUMENT

The law of the case doctrine promotes confidence in the stability of judicial decisions, encourages judges to make a correct decision in the first instance and prohibits judges from sitting in review of their own decisions. The trial court in this case violated that doctrine. The court entered an award of attorney fees following a hearing of which all parties had been given notice and at which all interested parties had an opportunity to

object and present evidence and arguments, and at which arguments both for and against the claimed award of attorney fees were made by competent counsel. The trial court committed error in thereafter reviewing and modifying its own decision. Such a modification can appropriately be made only where there has been a change of circumstances or where other exceptional circumstances exist which justify reconsideration of the decision. The mere citation of additional case authority is not justification for reconsideration. Similarly improper as a grounds for reconsideration is the trial court taking the time to make a more thorough review of materials which were already available to the court prior to the first decision. No valid justification existed in this case for the trial court to reexamine its own decision, and the trial court committed error in so doing.

Even if the trial court possessed the legal authority to reconsider its own decision, there was no evidentiary basis to modify the decision. All of the admissible evidence in the case established that the initial award of attorney fees was reasonable, or was less than reasonable. The plaintiff class, from whose recovery the attorney fee would be deducted, had agreed to the fee initially awarded. The trial court reduced the fee based predominantly on "lodestar" analysis and on impressions and feelings concerning appellants which were developed subsequent to the time for which the attorney fees were to be awarded. Lodestar analysis should be rejected by this Court in common fund cases in favor of a percentage fee approach. A growing number of courts have

rejected lodestar and adopted a percentage fee approach after extensive investigation. The lodestar analysis promotes dissention between the attorneys and their clients, and involves a detailed accounting which is unnecessary and unproductive. The trial court further committed error in basing the reduction in attorney fees on events which transpired subsequent to the period for which fees were awarded. Such evidence of subsequent events is irrelevant and should not have been considered by the trial court.

The trial court further committed error in referring issues concerning the reasonableness of attorney fees to a special master. There were no exceptional circumstances which justified the appointment of a master to review the attorney fees. More critically, both the master and the trial court apparently viewed the master's role to be that of an advocate cloaked with quasi-judicial authority. The master improperly took evidence on the issue of attorney fees off the record and without notice to the interested parties. The master communicated the improperly obtained evidence to the trial court through both formal reports and ex parte contacts. The proceedings before the special master were violative of due process, and the trial court erred in failing to strike the reports and appointment of the master.

Finally, the extent of the trial court's involvement in the improper proceedings of the master have put the trial court in the position of having received extensive evidence and arguments in a procedurally improper context. Any remand of this case should be

to a different judge who has not been tainted by the receipt of the improperly obtained evidence.

ARGUMENT

POINT I

THE TRIAL COURT WAS BARRED BY THE LAW OF THE CASE FROM RECONSIDERING ITS INITIAL AWARD OF ATTORNEY FEES.

The complicated and embroiled procedural history of this case demonstrates the evil of permitting a judge to recall and reconsider apparently final orders. The trial court's Memorandum Decision of December 5, 1988, and the Order of December 5, 1988, appeared on their face to make a conclusive and final award of attorney fees. The trial court imperiled the certainty of all judicial decisions by improperly purporting to recall and reconsider its own decision.

The Utah Supreme Court has long held that a decision, once made, should be considered final except in very unusual circumstances. In Drury v. Lunceford, 18 Utah 2d 74, 415 P.2d 662 (1966), the Court considered whether a party should be permitted to seek reconsideration, and "re-re-consideration," etc., of a ruling on a motion for new trial. The Court held that a motion for reconsideration was not permitted under the rules, and also explained that the restriction applied both to litigants and to the trial court:

> This reflection brings one to realize what an unsatisfactory situation would exist if a judge could carry in his mind indefin-

> itely a state of uncertainty as to what the final resolution of the matter should be.
>
> . . . When the precedure [sic] authorizing a motion for a new trial has been followed and, pursuant to proper notice, the parties have made their representations to the court, and the court has duly considered and made his decision upon that motion, that completes both the duty and the prerogative of the court. In order to avoid such a state of indecision for both the judge and the parties, practical expediency demands that there be some finality to the actions of the court; and he should not be in the position of having the further duty of acting as a court of review upon his own ruling.

Drury, 415 P.2d at 663-64 (emphasis added) (citations omitted).

Although Drury dealt with a final ruling, the same logic applies to reconsideration of interim rulings. The "law of the case" doctrine provides that a decision will not be reconsidered at the same level except in very limited circumstances; any review should be by an appellate court:

> Although "[a]ny judge is free to change his or her mind on the outcome of a case until a decision is formally rendered," Bennion v. Hansen, 699 P.2d 757, 760 (Utah 1985), the "law of the case" doctrine is employed to avoid delay and to prevent injustice. "The purpose of [this] doctrine is that in the interest of economy of time and efficiency of procedure, it is desirable to avoid the delays and the difficulties involved in repetitious contentions and rulings upon the same propositions in the same case." Richardson v. Grand Central Corp., 572 P.2d 395, 397 (Utah 1977). See Condor v. A.L. Williams & Assocs., Inc., 739 P.2d 634, 636 (Utah Ct. App. 1987). "Although a trial court is not inexorably bound by its own precedents, prior relevant rulings made in the same case are generally to be followed."

People ex rel. Gallagher v. District Court, 666 P.2d 550, 553 (Colo. 1983).

Salt Lake City Corp. v. James Constructors, Inc., 761 P.2d 42, 45 (Utah Ct. App. 1988).

The law of the case is sometimes expressed in terms of prohibiting a different judge of the same court from overruling a prior decision in the case. E.g., Sittner v. Big Horn Tar Sands & Oil, Inc., 692 P.2d 735, 736 (Utah 1984). The doctrine is equally applicable, however, to prohibit reconsideration of a ruling by the same judge or court which made the initial ruling. State ex rel. C.Y. v Yates, 765 P.2d 251, 253 (Utah Ct. App. 1988) (appellate court would not reconsider its own prior ruling); Salt Lake City Corp. v. James Constructors, Inc., 761 P.2d 42, 44-45 (Utah App. 1988) (trial court properly refused to reconsider his own prior ruling, even though the ruling was wrong on the merits and subsequently reversed by appellate court).

The cases acknowledge that there are circumstances in which a court might properly reconsider its own ruling, but such circumstances do not exist in this case. The trial court apparently believed that justification existed for reexamining its ruling because it discovered additional cases on attorney fees and because it had taken the opportunity to review in more detail the materials which had been previously submitted. These factors do not constitute grounds for reconsidering a decision. This was illustrated in the case of Sittner v. Big Horn Tar Sands & Oil, Inc., 692 P.2d 735 (Utah 1984). The trial court in that case had denied the

plaintiff's motion for summary judgment, and another judge of the same court later granted the motion. The Utah Supreme Court reversed and remanded for trial, without considering whether the summary judgment was proper and thus whether there were any fact issues to be tried. The Court stated as follows:

> No discovery took place between the two hearings on the summary judgment motions. No additional evidence was introduced. All material facts remained the same. Indeed, a comparison of the moving papers filed in support of the original motion and the renewed motion discloses that the only difference between the two was the citation of additional authorities.

Sittner, 692 P.2d at 736.

No procedural or other irregularities have been claimed with respect to the November 30, 1988, hearing concerning attorney fees. All parties were given notice in a form approved by the trial judge. (Agreed Statement para. 9.) All parties had an opportunity to present arguments. Arguments by capable counsel were presented both for and against appellants' claim for attorney fees. (Agreed Statement para. 13.) No restrictions were placed on the time which the trial court had to study the record before making a decision, nor on the scope of cases or other materials which the trial court could review. After having taken what the court then apparently considered to be a sufficient time to advise itself, the court entered a Memorandum Decision which, among other things, found the following:

> (1) That the attorneys have reasonably spent in excess of 12,000 hours, and will spend more time before the matter is

concluded. The novelty and difficulty of the issues involved has required tremendous skill in dealing with these problems before the legislature and before the court.

(2) It is obvious that acceptance of this employment precluded other opportunities for employment.

(3) The fees customarily charged for employment such as this involve contingent arrangements. This litigation could not reasonably have otherwise been entertained, and the amount of 20% to 40% of the recovery is appropriate in this and other similar communities.

(4) Considering the amounts involved and the results obtained, it is difficult for the Court to find that counsel could have expected a much more optimistic result, though the depositors individually did. It is easily arguable that the maximum amount of liability under any scenario that the State should have incurred would have been an amount equal to the guarnteed [sic] amount of $15,000.00 per account which was the ILGC guarantee on such accounts. Thus, anyone whose account exceeded $15,000.00 could arguably have never expected a greater recovery.

(5) The time limitations imposed by the clients appear to be fundamentally irrelevant, except as they may apply to item (2) above.

(6) The nature and length of the relationship does not raise issues that are remarkable, except to state that perhaps the fact that the matter has been resolved in less than two years and without the necessity of trial would argue for a reduction in fees.

(7) The experience, reputation and ability of the lawyers is obvious and has been exemplary.

(8) The contingent relationship has already been referred to.

> Having considered each of the foregoing, the Court finds that a fee at the minimum of the contingent agreement relationship in the amount of 20% of the total recovery is reasonable. The attorney's fees are thus awarded in the amount of $5,800,000.00. However, the Court finds that many matters related to this case have not been concluded by counsel and thus the Court will reserve 10% of the fee until counsel have faithfully completed all matters in the case.

Memorandum Decision, filed December 5, 1988, at pp. 6-7. (A complete copy of the Memorandum Decision appears in the Appendix.)

Based on the foregoing findings, the trial court entered an Order awarding the attorney fees to appellants, and further ordering that 90% of the fees "are to be paid immediately." (Order, filed December 6, 1988, p. 3, para. 3. A copy of the Order appears in the Appendix.) Nothing in the Order indicated that it was other than a final determination of the attorney fee issue.

Based upon the well-established doctrine of the law of the case, the trial court erred in reconsidering its December 5, 1988 Memorandum Decision and December 6, 1988 Order. This case should be remanded to the trial court with directions to reinstate the December 6, 1988 Order.

POINT II

REDUCTION OF ATTORNEY FEES WAS BASED IN PART ON THE LODESTAR ANALYSIS, WHICH IS NOT APPROPRIATE FOR COMMON FUND CASES, AND WAS CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE.

A. The Lack Of Detailed Findings Of Fact Precludes Meaningful Appellate Review And Requires Reversal.

The amount of fees awarded to attorneys for successful plaintiffs in class action litigation is determined by the court. "Calculation of reasonable attorney fees is in the sound discretion of the trial court, and will not be overturned in the absence of a showing of a clear abuse of discretion." Dixie State Bank v. Bracken, 764 P.2d 985, 988 (Utah 1988) (citations omitted). The award of attorney fees must, however, be supported by evidence in the record. Id. Where a party has made a prima facia showing of an entitlement to a specified amount of fees, it is error for the court to reduce the fees without making an adequate explanation for the reduction. Id.; Martindale v. Adams, 777 P.2d 514, 517-18 (Utah Ct. App. 1989). The court's analysis and evidentiary foundation for reducing the fees must be set forth in findings of fact with enough detail to enable the reviewing court to determine whether the trial court abused its discretion. Regional Sales Agency, Inc. v. Reichert, 784 P.2d 1210, 1215-16 (Utah Ct. App. 1989).

The trial court in this case was required to make specific findings to justify the reduction of the claimed fee. The court's initial award was supported by the evidence. The court itself so

held in its Memorandum Decision of December 5, 1988. In addition, appellants proffered to the trial court evidence from several expert witnesses (attorneys skilled in class action and percentage fee litigation) each of whom established that the initial fee award was reasonable or less than reasonable. No contrary evidence was submitted in support of the reduction. The agreement between appellants and the plaintiff class provided that a reasonable fee would be in the range of 20-40% of the recovery. The fee initially awarded by the court was 20% of the $29 million portion of the recovery.

The trial court was accordingly required to explain its reasons for reducing the fee. It is impossible to determine from the Memorandum Decision, however, precisely why the fee was reduced. The Memorandum Decision does recite the various factors which may be considered by the court in fixing a fee, but does not detail how the court analyzed each factor. To the extent that the court does explain its analysis, the analysis does not support the fee ultimately awarded.

Appellants argue in Point I of this brief that the law of the case requires that the trial court reinstate its initial award of attorney fees. If this Court does not so hold, the case must nonetheless be remanded to the trial court for the entry of specific findings to enable this Court to review whether the trial court abused its discretion.

B. This Court Should Adopt A Percentage-Of-Fund Approach To Setting Attorney Fees In Common Fund Litigation.

Much of the dispute before the trial court and the special master centered around the attempt to apply "lodestar" or hour-based analysis to this case. Although award of attorney fees is usually reviewed for an abuse of discretion, Dixie State Bank v. Bracken, 764 P.2d 985, 988 (Utah 1988), no deference need be given where the trial court's discretion was exercised based on an erroneous legal standard. See Swainston v. Intermountain Health Care, Inc., 766 P.2d 1059 (Utah 1988) (trial court ruled on discretionary matter based on an erroneous legal premise; reviewed for correctness); see also Fogel v. Chestnutt, 668 F.2d 100, 116-17 (2nd Cir. 1981).

The appellants and the trial court assumed, without citation to any supporting authority, that the trial court had ultimate discretion to set the fee. The Special Master cited as support for this proposition the case of Damac, Inc. v. Whitler, 118 Ill. App. 3d 560, 455 N.E. 2d 254 (1983), where the court stated:

> In a class action, the fee is not the result of a voluntary agreement between the attorney and his client. Rather, the fee is an amount taken by order of the court from money that belongs to others, and the amount is dependent upon the exercise of the court's sound discretion.

455 N.E.2d at 256 (citations omitted).

In the instant case, however, the fee agreement was the result of a voluntary agreement between the attorneys and their clients. Over 80% of the class expressly approved the fee agree-

ment. Over 99.9% of the class approved the settlement, together with appellants' request for a fee of $7.25 million. Although the fee agreement did state that the fees would be set by the trial court, the fee agreement also clearly stated that a reasonable fee would be awarded, and that a reasonable fee would be (1) based on a percentage of the recovery and (2) in the range of 20% to 40% of the recovery. Under the unique circumstances of this case, therefore, the trial court was required to give great deference to the "contractual" agreement between the class and their counsel, and to set the fee as a percentage of the recovery, with 20% - 40% being the agreed range of a reasonable fee.

It appears from the record that the trial court instead choose to largely ignore the agreement, and computed a fee based on an analysis of the hours spent by appellants. The trial court's reduction in fees was largely influenced by lodestar analysis.

"Lodestar" is a term which was coined by the court in Lindy Brothers, Inc. of Philadelphia v. American Radiator and Standard Sanitary Corp., 487 F.2d 161 (3rd Cir. 1973). The lodestar approach essentially has the court determine the number of hours reasonably spent in obtaining the results, and then adjust the compensation for those hours either up or down by a multiplier the court determines appropriate. Factors considered in the adjustments include the quality of the work performed and the contingent nature of the case, etc. Other modifications of the lodestar approach have been developed; for example, the Fifth Circuit

adopted a fifteen-factor method to calculate fees. Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974).

Such hour-based formulas have come under increasing attack, and the better reasoned opinions now recognize that the preferred approach in common fund cases is to award a fee based on a percentage of the recovery. The United States Supreme Court recognized this method as being common in Blum v. Stenson, 465 U.S. 886, 900 n. 16 (1984). The United States Court of Appeals for the Third Circuit, which was the court to initially adopt the lodestar approach, has now rejected that approach in favor of a percentage fee approach. Report of the Third Circuit Task Force, Court Awarded Attorney Fees, 108 F.R.D. 237 (1985).

A recent court to adopt the common fund approach analyzed the logic of prior cases as follows:

> Courts have pursued a number of alternatives at the fee application stage. Some, by themselves or with the assistance of a magistrate, have waded through the computer printouts, which often represent years of work by several firms, their partners, associates, and paralegals. Others have appointed special masters familiar with the field and with attorney billing to perform the details of the task and to make a recommendation. The special master is then paid from the common fund. This court has used both of these alternatives. Undoubtedly, there are more creative ones that other courts have found. What is curious is that whatever method is used and no matter what billing records are submitted to the Lindy or Kerr-Johnson [Kerr v. Screen Extras Guild, Inc., 526 F.2d 67 (9th Cir. 1975), cert. denied sub nom., Perkins v. Screen Extras Guild, Inc., 425 U.S. 951 (1976); and Johnson v. Georgia Highway Express, Inc., supra] regimen, the result is an award that almost always

> hovers around 30% of the fund created by the settlement.
>
> The question this court is compelled to ask is, "Is this process necessary?" Under a cost-benefit analysis, the answer would be a resounding, "No!" Not only do the Lindy and Kerr-Johnson analysis consume an undue amount of court time with little resulting advantage to anyone, but, in fact, it may be to the detriment of the class members. They are forced to wait until the court has done a thorough, conscientious analysis of the attorneys' fee petition. Or, class members may suffer a further diminution of their fund when a special master is retained and paid from the fund. Most important, however, is the effect the process has on the litigation and the timing of settlement. Where attorneys must depend on a lodestar approach there is little incentive to arrive at an early settlement. The history of these cases demonstrates this as noted below in the discussion of typical percentage awards.

In re Activision Securities Litigation, 723 F. Supp. 1373, 1376 (N.D. Calif. 1989).

The court analyzed cases from numerous other jurisdictions and concluded as follows:

> Reviewing this history the court is compelled to conclude that the accepted practice of applying the lodestar or Kerr-Johnson regimen to common fund cases does not achieve the stated purposes of proportionality, predictability and protection of the class, it encourages abuses such as unjustified work and protracting the litigation. It adds to the work load of already overworked district courts. In short, it does not encourage efficiency, but rather, it adds inefficiency to the process.
>
> Therefore, this court concludes that in class action common fund cases the better practice is to set a percentage fee

> and that, absent extraordinary circumstances that suggest reasons to lower or increase the percentage, the rate should be set at 30%. This will encourage plaintiff's attorneys to move for early settlement, provide predictability for the attorneys and the class members, and reduce the time consumed by counsel and court in dealing with voluminous fee petitions.

Id. at 1378-79. See also McConaughy, Back to the Future: Use of Percentage Fee Arrangements in Common Fund Litigation, 12 U. Puget Sound L. Rev. 43 (1988) (recommends the use of a percentage fee agreement in common fund cases, and notes that a fee of 20 to 25% is typical.)

It is evident from a review of the record in this case that both the special master and the trial court were overly concerned with trying to relate the number of hours spent by appellants to the fee awarded, and with the claimed disparity between the value of those hours at an hourly billing rate and the amount of the claimed fee. The disparity does not, however, mean that the claimed compensation is unreasonable. As set forth in the cases cited above, appellants could no doubt have protracted the litigation with the result that their hours would have been higher. Appellants should not be penalized for their efficiency:

> Where success is a condition precedent to compensation, "hours of time expended" is a nebulous, highly variable standard, of limited significance. One thousand plodding hours may be far less productive than one imaginative, brilliant hour. A surgeon who skillfully performs an appendectomy in seven minutes is entitled to no smaller fee than one who takes an hour; many of patients would think he is entitled to more.

Hornstein, Legal Therapeutics: "The Salvage Factor" in Counsel Fee Awards, 60 Harvard L. Rev. 658, 660 (1956).

This Court should hold that the number of hours spent should be given little, if any, weight in determining the appropriate attorney fee in common fund litigation, and that the attorney fee should generally be determined as a percentage of the recovery. It was error in this case for the trial court to give any weight to the number of hours spent, and the reduction of attorney fees must be vacated.

C. There Is No Evidentiary Basis For The Trial Court's Conclusion That Appellants' Hours Were Padded Or Unreasonable.

The preceding analysis establishes that the number of hours spent by counsel should not be a factor in determining an attorney fee award. Even if this Court affirms the trial court's reliance on lodestar analysis, the multiplier chosen by the trial court is not supported by the evidence.

Awards of attorney fees are addressed to the sound discretion of the trial court. Dixie State Bank v. Bracken, 764 P.2d 985, 988 (Utah 1988). Where the underlying evidence is proffered, however, this Court is in as good a position as the trial court to evaluate the evidence. Bess v. Jensen, 782 P.2d 542, 544 (Utah Ct. App. 1989) (citing Sacramento Baseball Club, Inc. v. Great N. Baseball Co., 748 P.2d 1058, 1060 (Utah 1987)). Under such circumstances, the trial court's decision should be affirmed only if this Court is convinced of its correctness. Id. See also Rohde v. K. O. Steel Castings, Inc., 649 F.2d 317, 320-21 (5th Cir. 1981).

On page 10 of its Memorandum Decision, the trial court "suggests that class counsel's reported hours submitted to the court were higher than reasonable hours, and the court has noted certain discrepancies in such reported hours." The special master's final report made similar claims. (Final Report, p. 20.) Nowhere, however, does either the court or the special master detail exactly what discrepancies exist, nor give any factual basis for the claim that the hours were higher than reasonable hours. The court's unsupported statements should be stricken and the reduction in fee vacated.

D. The Trial Court Improperly Based the Fee Reduction on Events Which Occurred After the Fee Was Earned.

In connection with its original fee award, the trial court found that "[t]he experience, reputation and ability of the lawyers is obvious and has been exemplary." (Memorandum Decision, filed December 5, 1988, at p. 7.) As supposed support for the reduction, the trial court found on October 31, 1989, that "on the issue of evaluation of skills and competence of counsel, the Court finds based in part on the hearing of July 17, 1989, and a review of the record, that counsel's court performance does not merit exceptional recognition." (Memorandum Decision, filed October 31, 1989, p. 10.)

Even assuming that something occurred in the July 17, 1989, hearing which would justify the trial court in criticizing the court performance of appellants, that hearing occurred long after the period of time for which fees were sought. Subsequent events

are generally not admissible proof concerning what happened on a prior event. See Utah R. Evid. 407.

There was no evidence which could support the trial court changing its finding. The original finding was based solely on the trial court's observation of appellants in various court proceedings prior to December 5, 1988. No additional evidence on that issue was presented. It was error for the trial court to reconsider the finding.

Of more concern is that fact that the trial court apparently changed its finding because of a personal dislike for one of the appellants and a personal offense at arguments presented at the July 17, 1989, hearing. Although the trial court states in its Memorandum Decision that it had reviewed "the oral arguments of counsel" from the July 17 hearing (Memorandum Decision, Oct 31, 1989, p. 1), the trial court really only reviewed the arguments of Malcolm A. Misuraca. Arguments were also presented by Craig G. Adamson, attorney for the depositors, and by Jackson Howard, attorney for appellants. The arguments of Mr. Misuraca were really only intended to fill time while the parties waited for Mr. Howard to appear at the arguments. The primary arguments for appellants were offered by Mr. Howard.

Yet the trial court ordered a transcript of only Mr. Misuraca's arguments at the hearing. The arguments presented by Mr. Misuraca were critical of the trial court, and the trial court apparently took umbrage. A review of the October 31, 1989, Memorandum Decision compels the conclusion that it is primarily a

personal response to the arguments of Mr. Misuraca. It was wholly improper for the trial court to have stooped to penalizing the appellants by a personal attack on Mr. Misuraca.

POINT III

THE IMPROPER PROCEEDINGS BEFORE THE MASTER REQUIRE REVERSAL.

Rule 43(a) of the Utah Rules of Civil Procedure explicitly states that "[i]n all trials, the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules, the Utah Rules of Evidence, or a statute of this state." (Emphasis added.) Our judicial system contemplates that all evidence considered by the judge will be developed in the courtroom. In limited circumstances, a judge is permitted to view the premises in question in a lawsuit, but only when notice is given to all parties. E.g., Highbarger v. Thornock, 94 Idaho 829, 498 P.2d 1302, 1304 (1972). It is reversible error for a judge to violate this fundamental notion of due process by investigating the facts himself. Id.

Equally "fundamentally contrary to the nature of our adversary system" would be a judge acting as an advocate for one of the parties. Lima v. Chambers, 657 P.2d 279, 283 (Utah 1982).

A trial court clearly cannot employ another judicial officer to improperly take evidence which the judge could not do himself. Yet such a fundamental violation of due process occurred in this case. The trial court appointed a special master for the stated purpose of reviewing requests for cost reimbursement. The initial

appointment appeared of record and was limited in scope. There thereafter commenced, however, a series of discussions between the master and court, all off the record, in which the master apparently persuaded the court to increase the master's authority and pursuant to which the master undertook to provide an advocacy role in the litigation. Although the trial court in its Memorandum Decision purported to conduct "its own review and evaluation," and to make "its own memorandum decision," (Memorandum Decision at 7-8), the proceedings had become so tainted by the contact with the master that appellants were denied a right to a fair trial before an unbiased judge. The error was prejudicial and requires reversal. The primary areas of error relating to the master are briefed below.

A. The Activities Of The Special Master Exceeded Both The Scope Of His Appointment And The Permissible Duties Of A Special Master.

Special Master James U. Jensen[1] was initially appointed solely for the limited purpose of reviewing the claims for cost reimbursement submitted to the trial court. Appellants did not object to the initial appointment. When it became evident, however, that the special master was vastly exceeding the scope of his employment, appellants did object (Motion to Strike Reports of

[1]Another special master, Arthur Anderson, was appointed to review certain accounting matters and to make disbursements of funds to class members. The appointment and scope of the activities of Special Master Arthur Anderson are not at issue in this appeal. The term "special master" as used herein, unless otherwise indicated, shall refer only to James U. Jensen.

Special Master and for Other Relief, filed June 15, 1989), but the trial court overruled the objections and attempted to expand the scope of the master's inquiry beyond all permissible bounds. The matter should be reviewed by this Court for an abuse of discretion. The abuse of discretion is patent.

Rule 53(c) of the Utah Rules of Civil Procedure provides, in part, as follows:

> The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing of the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order.

(Emphasis added.)

Because the use of special masters is a rare occurrence, the Utah courts have developed almost no case law interpreting Rule 53. Rule 53 of the Federal Rules of Civil Procedure, which is essentially the same as the Utah Rule, has generated more, though not extensive, case law. Where the Utah case law is not fully developed, and because the Utah Rules are patterned after the Federal Rules, federal law may be used as a guide. Heritage Bank & Trust v. Landon, 770 P.2d 1009, 1010 n.2 (Utah Ct. App. 1989). Accord Pate v. Marathon Steel Co., 692 P.2d 765, 767 n.1 (Utah 1984). Subsection (c) of Rule 53 of the Federal Rules of Civil Procedure

is identical to the same provision of the Utah rule in every respect except that the words "the master" are used in the federal rule where the Utah rule uses the word "he."

The plain language of Subsection (c) dictates that when a special master is appointed to perform only certain tasks delineated in the order of reference, then the powers of the master are limited in scope to those specifically enumerated items. In explaining the federal rule, Moore's Federal Practice states as follows:

> The scope of the master's authority "may" be specified or limited by the order of reference. If so, the order of reference is "at once the chart and limitation of the master's authority." And the master should not exceed it even with the consent of the parties. The order of reference may direct the master to report only upon particular issues or to do or perform particular acts or to receive and report evidence only. But as indicated by the use of the word "may" in the first sentence and by the general grant of power given by the second sentence of subdivision (c), a reference containing no limitations is a general reference to report on all the issues, both of law and fact, involved in the litigation.

5A J. Moore, W. Taggert and J. Wicker, Moore's Federal Practice, para. 53.06 (2d ed. 1989) (quoting Ferguson Contracting Co. v. Manhattan Trust Co., 118 F. 791, 794 (6th Cir. 1902)) (emphasis added). (Hereinafter "Moore's".)

Moore's goes on to state as follows:

> The order of reference is the chart of the master's authority, which may give the master broad, general powers, or may specify or limit his powers, direct him to report only upon particular issues, do or

> perform particular acts, or to receive and report evidence only. The report of the master should accordingly be responsive to the order of reference.

5A Moore's, at para. 53.10[1] (citations omitted). A special master may not exceed the scope of his charge because "[t]he power of a special master is completely dependent upon the order of reference." United States v. I.B.M. Corp., 66 F.R.D. 154 (S.D.N.Y. 1974). Accord Messier v. Messier, 140 Vt. 308, 438 A.2d 397 (1981) (interpreting rule of civil procedure identical to Utah's).

The trial court first mentions the appointment of James U. Jensen as Special Master in its Memorandum Decision dated December 5, 1988. On pages 8 to 9 of that decision, this Court specifically held as follows:

> 3. The unpaid costs and fees proportion shall be reserved, subject to a similar accounting to the Court directly. Since these matters will require voluminous supportive documentation, the Court hereby and herein appoints James U. Jensen, Esq., under Rule 53 of the Utah Rules of Civil Procedure as a Special Master for the purpose of reviewing the specific documentation giving rise to the requested reimbursement costs. Mr. Jensen is to make specific recommendations to the Court as to his findings. No fees will be approved for reimbursement of costs or unpaid costs and expenses until specifically recommended by the master and approved by the Court. Mr. Jensen is charged with a duty both to be fair to those requesting payment and to function as a fiduciary for the purpose of preserving the maximum estate to the depositor group from the funds so withheld. Mr. Jensen and/or persons in his firm are hereby expressly authorized to have access to any and all documentation supporting such costs and fees, including the lobbyist's fee requests, and shall be provided such material upon request at the offices

> of D.O.I.T., Arthur Andersen, Research Associates and/or any other firm, entity or individual requesting compensation as they deem necessary. Compensation to Mr. Jensen shall be carefully reviewed by the Court and shall be paid from the funds reserved.

Memorandum Decision, pages 8-9 (emphasis added).[2]

The order of reference, which according to Rule 53 is the controlling document, provides as follows:

> 4. That James U. Jensen, Esq. be appointed, pursuant to Rule 53 of the Utah Rules of Civil Procedure, as a special master <u>for the purpose of reviewing requests for costs reimbursements</u>, and that services rendered as special master be compensated from the funds hereinafter reserved, as approved by the court;

Order of December 6, 1988, page 3 (emphasis added).

The trial court's direction and charge to the Special Master was clear. James U. Jensen was appointed for the purpose of reviewing costs reimbursements only. The Special Master, however, took it upon himself to go beyond the scope of his charge and

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[2] The language of the Memorandum Decision in several places mentions "fees." It is readily apparent, however, that the fees referred to are those of the experts and not attorney's fees. Immediately preceding the above quoted paragraph, the Memorandum Decision states that "[t]he reimbursement for depositors in the amount of $300,000.00 shall be reserved, subject to release on specific application to the Court based upon specific documentation of <u>costs and fees</u> and shall only be released upon Court approval." (Emphasis added.) Paragraph 3 then begins by speaking to the same unpaid costs and fees, which clearly refers to the $300,000.00 in costs previously advanced by the DOIT Committee, for which reimbursement was sought. Likewise, the other references in paragraph 3 to "fees" refer to expert fees, including the specifically referenced "lobbyist's fee requests", and not to attorney's fees. There should have been no confusion on the part of the Special Master as to the meaning of these terms.

review the issue of attorney fees notwithstanding the fact that that issue had already been determined by the trial court.

When appellants objected to the appointment of the master, the trial court responded by sua sponte entering a series of minute entries which purported to "clarify" the master's responsibilities. The minute entries, copies of which appear in the Appendix, essentially set the master up as an advocate for the class with a duty to challenge the prior orders of the court. Aside from the procedural irregularities in attempting to expand the scope of the charge after the fact, the court had no authority to vest a special master with the roles of both advocate and judge.[3]

Rule 53 of the Utah Rules of Civil Procedure provides as follows:

> (a) Appointment and Compensation. Any or all of the issues in an action may be referred by the Court to a master upon the written consent of the parties, or the court may appoint a master in an action, in accordance with the provisions of Subdivision (b) of this rule.
>
> * * *
>
> (b) Reference. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a

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[3]Even more disturbing is the fact, revealed for the first time in billing records filed with the court subsequent to the filing of the Notice of Appeal herein, that the special master conferred extensively with the Court in response to the challenges to the special master's appointment, and presumably participated in ruling on the objections to his own appointment. (E.g., Affidavit of Robert L. Stolebarger in Support of Motion for Disqualification, filed Nov. 21, 1989, at paras. 25-26.)

> reference shall, in the absence of the written consent of the parties, be made only upon a showing that some exceptional condition requires it.

(Emphasis added.) This requirement that the appointment of a special master must be "the exception and not the rule" is derived from important policy considerations: first, "the function of the master [is] to hear only those matters which it would unduly hamper the court (or the jury) to deal with;" second, Rule 43(a) requires "all testimony of witnesses to be taken orally in open court," unless otherwise provided by the rules; and third, the exceptional conditions requirement of Rule 53 "is an obvious corollary of the policy against the judiciary abrogating its functions." 5A Moore's at para. 53.05[1].

The United States Supreme Court established the standard for determining "exceptional conditions" in the case of La Buy v. Howes Leather Co., 352 U.S. 249, reh'g. denied, 352 U.S. 1019 (1957). The Court held that "[t]he use of masters is 'to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause,' and not to displace the Court." Id. at 256 (quoting In re Peterson, 253 U.S. 300, 312 (1920)). In light of this fact, the Court went on to establish a standard of very limited use of special masters. Neither congested court calendars, unusual complexity of issues of fact and law, nor the possibility of a very lengthy trial are exceptional conditions. Id. at 259. The Court held that detailed accounting required to determine

damages might be referred to a master provided the circumstances indicate that the use of the Court's time is not warranted. Id.

Calendar congestion, complex issues, and the possibility of lengthy trials had, previous to La Buy, been cited frequently as exceptional conditions. The Supreme Court's elimination of these concepts for exceptional conditions "has led La Buy to be widely interpreted as sharply limiting the use of non-consensual reference." Liptak v. United States, 748 F.2d 1254, 1257 (8th Cir. 1984) (citing Bennerson v. Joseph, 583 F.2d 633, 641-42 (3rd Cir. 1978); Piper v. Hauck, 532 F.2d 1016 (5th Cir. 1976); and Arthur Murray, Inc. v. Oliver, 364 F.2d 28 (8th Cir. 1966)). In Liptak, certain tax payers had brought an action against the government for wrongful levy, seeking a preliminary injunction to prevent the government from selling their home in order to collect delinquent taxes. The District Court entered a temporary restraining order preventing the sale of the home and referred the case to a special master for a recommendation on the question of whether to grant a preliminary injunction against the sale. The master held a hearing and prepared a report of his recommendations. The District Court adopted the master's report and the Liptaks appealed.

On appeal, the Liptaks argued that the reference to the special master was improper since there were no exceptional conditions to warrant the appointment. They further alleged that the master's report went beyond the scope of his charge in that the master was charged to consider the issue of a preliminary injunction, but the master, going beyond the issue of injunction,

recommended a dismissal of the Liptaks' Complaint. The Eighth Circuit Court reviewed the exceptional conditions requirement as set forth by the Supreme Court in La Buy, and found that "[b]eyond matters of account, difficult computation of damages, and unusual discovery, 'it is difficult to conceive of a reference of a nonjury case that will meet the rigid standards of the La Buy decision.'" Liptak v. United States, 748 F.2d at 1257 (quoting 9 C. Wright and A. Miller, Federal Practice and Procedure § 2605, at 791 (1971)). The Court then held that the District Court had abused its discretion in appointing a special master.

In the present case, consent of the parties was not solicited or given for the appointment of a special master. Some exceptional condition was therefore required. The special master was appointed to review cost reimbursement requests. Additionally, the master took it upon himself to review the issue of attorney fees. The issue of cost reimbursements cannot be said to be a matter of account, because the accounting was complete and the master was simply charged with the responsibility of reviewing the accounting, and presumably making recommendations as to the appropriateness of the cost reimbursement requests. This purpose does not fit within the narrow La Buy definition of exceptional conditions.

> Just as matters of account are apt to be most appropriate for reference, conversely there are some matters that may generally be inappropriate for reference. Or stated differently, it will be rare when some particular issues call for a reference in light of the "exceptional condition" requirement of Rule 53(b). Thus some appellate courts have expressed their

> disapproval of referring issues of costs
> . . . .

5A Moore's at para. 53.05[2] (citing Prudence-Bonds Corp. v. Prudence Realization Corp., 174 F.2d 288 (2d Cir. 1949)). Please note that the Prudence-Bonds Corp. case, cited in Moore's for the proposition that issues of costs are not appropriate for reference to a special master, was decided before the La Buy decision which restricted the use of special masters. If reference of issues of costs to a special master was inappropriate prior to La Buy, it certainly would not be appropriate after La Buy. It is even more clear that the trial court did not have authority to refer to the special master the question of attorney fees.

The conduct of the special master greatly exceeded both the actual and the permissible scope of his charge. The trial court abused its discretion in failing to quash the appointment and to strike all of the reports of the master.

B. The Master Improperly Acted As An Advocate.

The role of a special master is quasi-judicial in nature. A master has the "duties and obligations of a judicial officer," and is "an arm of the court." 5A Moore's, at para's. 53.03 & 53.05[2]. Rule 53 of the Utah Rules of Civil Procedure clearly contemplates a judicial role. The Rule gives to masters the authority to hold hearings, take evidence, hear testimony, and rule on the admissibility of evidence. These functions properly belong to the judiciary. Since a master functions in a judicial capacity, he necessarily has the obligation to fairly and impartially

consider the evidence and make recommendations based thereon. A special master has quasi-judicial powers, and "because he is the court's agent, he can and should perform his duties objectively." Ruiz v. Estelle, 679 F.2d 1115, 1162-63 (5th Cir.), cert. denied, 460 U.S. 1042 (1982). The job of advocating one position or another is left to the lawyers.

The Master in the present case confused his proper role with that of an advocate and adopted an adversarial posture. The trial court also apparently perceived the master's role as adversarial. The only justification given by the trial court for reevaluating the initial award of attorney fees was that the initial hearing was not "adversarial." (Memorandum Decision, October 31, 1989, p. 3.) The only "adversarial" element to the subsequent reduction, however, was the Special Master.

Both the special master and the trial court complained that "no worthy opposition" was raised to appellants' fee application at the hearing on November 30, 1988. Both the trial court and special master apparently perceived the special master's role as providing that opposition. That is contrary to fundamental notions of due process, Lima v. Chambers, 657 P.2d 279, 283 (Utah 1982). The initial premise was, in any event, incorrect. If "no worthy opposition" was raised to the fee application, it was not because of a lack of an adversarial proceeding. Competent counsel appeared at the November 30, 1988 hearing, and spoke against the appellant's claim for attorney fees. The hearing was adversarial. There was clearly no basis to appoint a special master. The trial court

abused its discretion in so doing. The effect of the appointment was clearly prejudicial, and the judgment of the trial court must be reversed.

C. The Proceedings Before The Special Master Violated Notions Of Due Process Because The Master Failed To Hold Hearings And Take Evidence On The Record.

In addition to having exceeded the scope of his charge, in violation of Rule 53(c), the Master failed to hold hearings, take evidence, hear witnesses, etc., as contemplated by Rule 53. A special master is called upon to perform a quasi-judicial function. He is to recommend factual findings and, in some instances, legal conclusions. In order to do so, a master must follow proper evidentiary procedures and comply with the requirements of due process; therefore, for a master to take evidence on which to base his findings and recommendations, hearings are required. Rule 53 presumes that hearings will be a part of the normal course of conduct of a special master.

> (c) Powers. The order of reference to the master . . . may fix the time and place for beginning and closing the hearings and for the filing of the master's report.

Utah R. Civ. P. 53(c) (emphasis added). Notice that the Rule refers to "the hearings," not "any hearings," and therefore expects that hearings will be held. Indeed, a master cannot perform a fact finding function within the bounds of due process without open hearings.

Based on this principle, the Fifth Circuit modified a district court's order of reference because the order allowed the special master to go beyond the bounds of Rule 53 and due process requirements:

> In one respect, the order of reference is too sweeping. It permits the special master to submit to the district court "reports based upon his own observations and investigations in the absence of a formal hearing before him." This not only transcends the powers traditionally given masters by courts of equity, but denies the parties due process.

Ruiz v. Estelle, 679 F.2d 1115, 1162-63 (5th Cir.), cert. denied, 460 U.S. 1042 (1982). The court went on to hold that the order of reference should be modified to reflect that "unless based on hearings conducted on the record after proper notice, the reports, findings, and conclusions of the special master are not to be accorded any presumption of correctness . . . ." Id. at 1163.

In response to objections from appellants, the master did condescend to hold one "hearing." Appellants had indicated that they would require at least two days to present evidence. (Agreed Statement para. 27.) The master instead, with the apparent blessing of the court, limited the presentation to approximately two hours on a Saturday morning. Appellants were required to present their evidence by way of proffer, rather than through live witnesses. Appellants attempted to comply with the master's direction, and submitted testimony from several expert witnesses based on a hypothetical question.

In his report to the court, however, the master attempted to discredit the proffered testimony, claiming that the hypothetical question was incomplete. It was clearly unfair for the master to require the presentation of evidence by proffer, and to then complain about the evidence thus presented in conformity with the master's request.

POINT IV

ANY REMAND OF THIS CASE SHOULD BE TO A DIFFERENT TRIAL JUDGE.

If any one thing is evident from the record, it is that the relationship between the trial court and appellants was strained and adversarial. Appellants suggest that any remand of this case must, in fairness, be with directions that the case be assigned to a different trial judge.

An award of attorney fees is addressed to the sound discretion of the trial court. Dixie State Bank v. Bracken, 764 P.2d 985, 988 (Utah 1988). It is difficult to conceive how the trial judge can, with impartiality, exercise its discretion without being influenced by a desire to vindicate the prior award.

Even where a formal motion for disqualification has been made and denied, the appellate court still has authority to order that the remand be made to a different trial judge. United States v. Bray, 546 F.2d 851, 860 (10th Cir. 1976). The court in that case stated:

> This case has been before the same trial judge twice. We do not challenge or question the integrity of the judge. However, under the totality of the facts

> and circumstances of this case, there is a real likelihood that the same trial judge's impartiality might reasonably be at issue under the terms of 28 U.S.C. § 455(a) which, as revised in 1974, disqualifies any judge from presiding in ". . . any proceeding in which his impartiality might reasonably be questioned." We conclude that the demands of justice require that the cause be retried before another judge.

See also Nicodemus v. Chrysler Corp., 596 F.2d 152, 157 (6th Cir. 1979) (matter remanded for rehearing before another judge even though no party had moved for disqualification or suggested a change of judge).

Canon 3(C)(1) of the Utah Code of Judicial Conduct similarly requires that "[d]isqualification must be entered in a proceeding by any judge whose impartiality might reasonably be questioned . . . ." The trial judge in this case has already twice tried the attorney fee issue. Under the totality of the facts and circumstances of this case, there is a "real likelihood" that the trial judge's impartiality would be questioned. In the event this case is remanded, therefore, this Court should direct that the case be assigned to a different trial judge.

CONCLUSION

The trial court's reduction in attorney fees made in the October 31, 1989, Memorandum Decision should be vacated, and the initial award made on December 6, 1988, reinstated.

Alternatively, the case should be remanded for a new hearing on the issue of attorney fees and the case should therefore be

reassigned to a different judge. This court should direct that on remand the appellants be awarded a reasonable attorney fee based on a percentage of the recovery, and based on the findings set forth in the Memorandum Decision of December 5, 1988.

DATED this 7th day of May, 1990.

Jackson Howard

JACKSON HOWARD and
LESLIE W. SLAUGH, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Appellants

MAILING CERTIFICATE

I hereby certify that four true and correct copies of the foregoing were mailed to the following, postage prepaid, this 7th day of May, 1990.

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APPENDIX A

Memorandum Decision, dated December 5, 1988

5 Dec 88

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

DOLLY PLUMB, SHEILA BOHARD, RON C. BOHARD, STEVE RIGBY, DEBBIE RIGBY, KENNETH CANDLAND, B. CHANG, DAO VAN NGUYEN, RANDALL HARDEN, PATTI HARDEN, LEE FIET, GARY STRATTON, H. T. ADAMS, ALBERT F. PERSCHON, RALPH KNUDSON, DEAN HADFIELD, ED WICKS, F. E. DRAPER, ARTEMUS LITTLE, NAOMA LITTLE, ANETTA J. BILGER, O'VERNON CAHALL, and all others similarly situated, WESTERN HERITAGE THRIFT & LOAN, INTERLAKE THRIFT & LOAN, COPPER STATE THRIFT & LOAN, and CHARTER THRIFT & LOAN, Utah Industrial Loan Corporation,

Plaintiffs,

vs.

THE STATE OF UTAH, GEORGE SUTTON, as Commissioner of Financial Institutions for the State of Utah, THE DEPARTMENT OF FINANCIAL INSTITUTIONS FOR THE STATE OF UTAH, ELAINE B. WEIS, ALPINE FIRST FINANCIAL, ALTA THRIFT AND LOAN, AMERICA INVESTMENT THRIFT, AVCO THRIFT, BASIN LOANS, INC., CAPITOL THRIFT & LOAN, CITICORP PERSON-TO-PERSON, COMMERCE FINANCIAL, COMMERCIAL CREDIT PLAN, INC., FIRST SECURITY FINANCIAL, FIRST THRIFT AND LOAN, GREAT WESTERN THRIFT & LOAN, FIRST CHARTER SAVINGS BANK (HERITAGE SAVINGS), FOOTHILL THRIFT AND LOAN, HOME

MEMORANDUM DECISION

CIVIL NO. C-87-4879

CREDIT THRIFT & LOAN, MODEL FINANCE, INC., OVERLAND THRIFT & LOAN, PEOPLE'S FIRST THRIFT, PIONEER THRIFT, ST. GEORGE THRIFT & LOAN, THE LOCKHART COMPANY, U.S. THRIFT & LOAN, UNITED THRIFT, UTAH FINANCIAL THRIFT, VALLEY THRIFT AND LOAN, WATKISS & CAMPBELL, INDUSTRIAL LOAN GUARANTY CORPORATION, RICHARD A. CHRISTENSON, JOHN H. FIRMAGE, JR., ROBERT B. BECKSTEAD, T. KAY LYMAN, RICHARD A. VAN WINKLE, IRENE JORGENSEN, STANLEY A. ANDERSON, DEAN G. CHRISTENSEN, ROBERT L. LOWE, ED M. JAMISON, RUSSELL B. JEX, CHARLES E. JOHNSON, RONALD C. LEASE, M.D. BORTHICK, ED H. THRONDSEN, RICHARD D. PAUL, TERRY WARNER, W. HAROLD DOBSON, RICHARD M. ROBINSON, PAUL A. MILLER, CARL A. HULBERT, JOHN C. JARMAN, FRED S. KOHLRUSS, LARRY E. GRANT, LARRY HENDRICKS, LARRY H. MILLER, and DOE 1 through DOE 300,

Defendants.

The above-entitled matter was set for hearing on the 30th day of November, 1988 on Motions for Final Court Approval of Settlement and Final Court Approval of Attorney's Fees and Costs. A representative of Arthur Anderson and Company indicated that the ballots had been collated and tabulated as to the depositors' responses in approval or disapproval of the settlement. It was reported to the Court that only two of approximately 5,000

responding depositors determined to opt out of the class, thus 99.9% of the respondents accepted the settlement as negotiated.

The Court asked if anyone wished to be heard in opposition to the settlement. Attorney Robert McDonald, identifying himself as counsel for the Association of Thrift Owners, stated that he desired to be heard even though he acknowledged that no formal objection had been filed by counsel. Mr. McDonald further indicated that he had been retained less than 24 hours earlier to proceed. After hearing the argument of Mr. McDonald, the Court denied his Motion, both as untimely and factually unfounded.

The Court further denied Mr. McDonald's request for additional time to provide the Court with supplemental information.

The Court then considered the issue of final approval of attorney's fees and costs, and heard from the following persons: Gay Taylor, Legislative General Counsel; Stephen Mecham of the Governor's Office; Ray Christensen, counsel for the State; Greg Sanders, associated with Carman Kipp, additional counsel for the State; Shelia Bohard, with the D.O.I.T. Group, and Gary Stratton, Chairman of the Board of the D.O.I.T. Group.

Finally, the Court heard argument from Malcolm Misuraca, one of the attorneys representing the depositor class. At the conclusion the Court asked if anyone else wished to be heard on

the issues before the Court and received no further requests for argument.

Based upon the pleadings on file and the arguments of counsel, the Court makes the following findings in respect to settlement and approval of costs and fees:

The agreement for settlement of the litigation is approved. The Court finds the settlement to be appropriate and reasonable on behalf of the depositors. Those electing to opt out of the settlement are granted their request, and are to participate in no further way in the settlement.

As to the remainder of this decision regarding fees and costs, the Court wishes to add parenthetically that the Court recognizes no matter what the resolution, someone will be dissatisfied. The Court recognizes that to set a fee at less than that requested by the plaintiffs' counsel will be annoying and unsatisfactory to counsel. The Court is also aware that setting any fee in excess of the legislative cap, or perhaps even up to the legislative cap, at $1.5 million will run the risk of creating in excess of 17,000 depositor ingrates. Recognizing that judges must make unpopular decisions, nevertheless the Court feels that the decision herein is appropriate.

In making a finding as to fees, the Court is mindful first of the agreement between the attorneys and the depositor group.

The agreement calls for a fee, subject to judicial approval, of not less than 20% nor greater than 40% of the recovery. While arguably the recovery amount may be $44 million, including $10 million from the State, $19 million from the insurance carrier, and $15 million as a guarantee against liquidation funds, the attorneys have requested their fee only in relation to the sum of $10 million and $19 million, or from the combined total of $29 million.

The Court is further aware of Rule 1.5 of the Rules of Professional Conduct which indicates that a reasonable fee should be determined by consideration of the following matters: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.

Viewing in order each of the above criteria, the Court finds:

(1) That the attorneys have reasonably spent in excess of 12,000 hours, and will spend more time before the matter is concluded. The novelty and difficulty of the issues involved has required tremendous skill in dealing with these problems before the legislature and before the court.

(2) It is obvious that acceptance of this employment precluded other opportunities for employment.

(3) The fees customarily charged for employment such as this involve contingent arrangements. This litigation could not reasonably have otherwise been entertained, and the amount of 20% to 40% of the recovery is appropriate in this and other similar communities.

(4) Considering the amounts involved and the results obtained, it is difficult for the Court to find that counsel could have expected a much more optimistic result, though the depositors individually did. It is easily arguable that the maximum amount of liability under any scenario that the State should have incurred would have been an amount equal to the guarnteed amount of $15,000.00 per account which was the ILGC guarantee on such accounts. Thus, anyone whose account exceeded $15,000.00 could arguably have never expected a greater recovery.

(5) The time limitations imposed by the clients appear to be fundamentally irrelevant, except as they may apply to item (2) above.

(6) The nature and length of the relationship does not raise issues that are remarkable, except to state that perhaps the fact that the matter has been resolved in less than two years and without the necessity of trial would argue for a reduction in fees.

(7) The experience, reputation and ability of the lawyers is obvious and has been exemplary.

(8) The contingent relationship has already been referred to.

Having considered each of the foregoing, the Court finds that a fee at the minimum of the contingent agreement relationship in the amount of 20% of the total recovery is reasonable. The attorney's fees are thus awarded in the amount of $5,800,000.00. However, the Court finds that many matters related to this case have not been concluded by counsel and thus the Court will reserve 10% of the fee until counsel have faithfully completed all matters in the case.

The depositors further asked for reimbursement to the depositors group in the amount of $300,000.00; and, for a fund reserving the amount of $650,000.00 to pay unpaid costs and expenses; and an account for future costs and expenses to be

reserved in the amount of $1,000,000.00. The Court specifically finds as follows:

1. The fund for future costs and expenses is not to be reserved. The amount of $1,000,000.00 requested is denied and that amount shall be included in the depositors' pool for distribution.

2. The reimbursement for depositors in the amount of $300,000.00 shall be reserved, subject to release on specific application to the Court based upon specific documentation of costs and fees and shall only be released upon Court approval.

3. The unpaid costs and fees proportion shall be reserved, subject to a similar accounting to the Court directly. Since these matters will require voluminous supportive documentation, the Court hereby and herein appoints James U. Jensen, Esq., under Rule 53 of the Utah Rules of Civil Procedure as a Special Master for the purpose of reviewing the specific documentation giving rise to the requested reimbursement costs. Mr. Jensen is to make specific recommendations to the Court as to his findings. No fees will be approved for reimbursement of costs or unpaid costs and expenses until specifically recommended by the master and approved by the Court. [redacted] Mr. Jensen and/or

persons in his firm are hereby expressly authorized to have access to any and all documentation supporting such costs and fees, including the lobbyist's fee requests, and shall be provided such material upon request at the offices of D.O.I.T., Arthur Anderson, Research Associates and/or any other firm, entity or individual requesting compensation as they deem necessary. Compensation to Mr. Jensen shall be carefully reviewed by the Court and shall be paid from the funds reserved.

Dated this 5th day of December, 1988.

/s/

DAVID S. YOUNG
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, postage prepaid, to the following, this 5th day of December, 1988:

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APPENDIX B

Order, dated December 6, 1988

DEC 6 4 20 PM '88

CLERK
COURT
BY Copy
DEPUTY CLERK

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

DOLLY PLUMB, SHEILA BOHARD, RON C. BOHARD, STEVE RIGBY, DEBBIE RIGBY, KENNETH CANDLAND, B. CHANG, DAO VAN NGUYEN, RANDALL HARDEN, PATTI HARDEN, LEE FIET, GARY STRATTON, H.T. ADAMS, ALBERT F. PERSCHON, RALPH KNUDSON, DEAN HADFIELD, ED WICKS, F. E. DRAPER, ARTEMUS LITTLE, NAOMA LITTLE, ANETTA J. BILGER, O'VERNON CAHALL, and all others similarly situated, WESTERN HERITAGE THRIFT & LOAN, INTERLAKE THRIFT & LOAN, COPPER STATE THRIFT & LOAN, UTAH INDUSTRIAL LOAN CORPORATION,

Plaintiffs,

v.

THE STATE OF UTAH, GEORGE SUTTON, as Commissioner of Financial Institutions for the State of Utah, THE DEPARTMENT OF FINANCIAL INSTITUTIONS FOR THE STATE OF UTAH, ELAINE B. WEIS, ALPINE FIRST FINANCIAL, ALTA THRIFT AND LOAN, AMERICA INVESTMENT THRIFT, AVCO THRIFT, BASIN LOANS, INC., CAPITOL THRIFT & LOAN, CITICORP PERSON-TO-PERSON, COMMERCE FINANCIAL, COMMERCIAL CREDIT PLAN, INC., FIRST SECURITY FINANCIAL, FIRST THRIFT AND LOAN, GREAT WESTERN THRIFT AND LOAN, FIRST CHARTER SAVINGS BANK (HERITAGE SAVINGS), FOOTHILL THRIFT AND LOAN, HOME CREDIT THRIFT & LOAN, MODEL FINANCE, INC., OVERLAND THRIFT

ORDER

Civil No. C87-4879

& LOAN, PEOPLE'S FIRST THRIFT, PIONEER THRIFT, ST. GEORGE THRIFT & LOAN, THE LOCKHART COMPANY, U.S. THRIFT & LOAN, UNITED THRIFT, UTAH FINANCIAL THRIFT, VALLEY THRIFT AND LOAN, WATKISS & CAMPBELL, INDUSTRIAL LOAN GUARANTY CORPORATION, RICHARD A. CHRISTENSON, JOHN H. FIRMAGE, JR., ROBERT B. BECKSTEAD, T. KAY LYMAN, RICHARD A. VAN WINKLE, IRENE JORGENSEN, STANLEY A. ANDERSON, DEAN G. CHRISTENSEN, ROBERT L. LOWE, ED M. JAMISON, RUSSELL B. JEX, CHARLES E. JOHNSON, RONALD C. LEASE, M.D. BORTHICK, ED H. THRONDSEN, RICHARD D. PAUL, TERRY WARNER, W. HAROLD DOBSON, RICHARD M. ROBINSON, PAUL A. MILLER, CARL A. HULBERT, JOHN C. JARMAN, FRED S. KOHLRUSS, LARRY E. GRANT, LARRY HENDRICKS, LARRY H. MILLER, and DOE 1 through DOE 300,

Defendants.

Consistent with this Court's Memorandum Decision heretofore issued on December 5, 1988,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the Agreement for Settlement of Litigation be approved;

2. That the two depositors requesting that they be allowed to opt out of the depositor class be granted their request and thereby excluded from the depositor class and the settlement;

3. That Malcolm A. Misuraca of LeBoeuf, Lamb, Leiby and MacRae, formerly of Misuraca, Beyers, Costin, Case and Provencher; George M. Haley and Robert L. Stolebarger of Haley & Stolebarger; and Douglas B. Provencher of Beyers, Costin and Case, formerly of Misuraca, Beyers, Costin, Case & Provencher, be awarded attorneys' fees in the amount of $5,800,000.00, 90% or $5,220,000.00 of which are to be paid immediately and 10% or $580,000.00 of which are to be reserved until counsel has faithfully completed all matters in the case. The award of attorneys' fees is intended to reflect 20% of the $29,000,000.00 portion of the settlement proceeds. As the $29,000,000.00 is reduced to take into account the two depositors who opted out of the depositor class, the attorneys' fees awarded herein and the reserve of 10% shall also be reduced proportionately to take into account these opt outs;

4. That James U. Jensen, Esq. be appointed, pursuant to Rule 53 of the Utah Rules of Civil Procedure, as a special master for the purpose of reviewing requests for costs reimbursements, and that services rendered as special master be compensated from the funds hereinafter reserved, as approved by the Court;

5. That $300,000.00 be reserved for reimbursement to depositors, subject to release on specific application to the Court based on specific documentation, as recommended by the special master and approved by the Court;

6. That $650,000.00 be reserved for payment of other costs and fees, subject to release on specific application to the Court based upon specific documentation, as recommended by the special master and approved by the Court.

7. That Arthur Andersen, a Court appointed Special Master under prior order, be paid from the funds reserved under paragraphs 4 and 5, above. In the event the reserved funds are insufficient to cover all claims for expenses authorized to be paid to Special Master Arthur Andersen by Special Master James U. Jensen, Esq., then Special Master James U. Jensen, Esq. shall request this Court to create an adequate reserve from the settlement proceeds to pay the expenses of Special Master Arthur Andersen.

8. That the "Notice of Objection to Disclosure Statement and Confirmation of Settlement" filed by an organization calling itself the "Association of Thrift Owners and Managers" be denied as factually unfounded, in that the factual allegations made therein are found to be untrue and not supported by competent evidence, and the Motion to Supplement Record made in open Court by Robert McDonald, appearing on behalf of said association, be denied as untimely.

December 6, 1988

BY THE COURT

DAVID S. YOUNG
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, postage prepaid, to the following, this 6 day of December, 1988:

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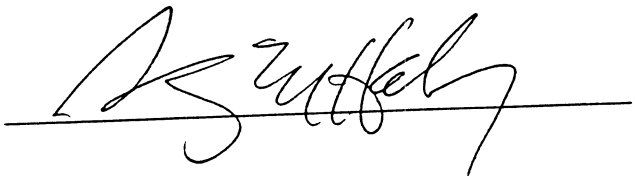

APPENDIX C

Memorandum Decision, dated October 31, 1989

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

DOLLY PLUMB, et al.,	:	MEMORANDUM DECISION
Plaintiffs,	:	CIVIL NO. C-87-4879
vs.	:	
THE STATE OF UTAH, et al.,	:	
Defendants.	:	

The above-entitled matter came on for consideration by the Court on the 17th day of July, 1989, with appearances as shown.

The purpose of the hearing was to review and approve a Final Order for payment of all costs and fees from money arising through a common fund case. The fund was created by a partial settlement of this class action litigation which settlement was previously approved by the Court.

The Court heard the oral arguments of counsel. The Court subsequently reviewed in detail that argument through a prepared transcript. The Court has reviewed the case law and reports submitted by the Special Master, and has reviewed the additional documentation submitted by the Special Master, class counsel and others.

The Court now being advised in the premises, renders this its:

MEMORANDUM DECISION

Since this decision only relates to the payment of fees and costs, a full history of the case is not relevant. However, some brief statement of the history of the Orders in relation to this aspect of the decision would be instructive.

On December 5, 1988, this Court entered a Memorandum Decision through which the Court appointed James U. Jensen as a special master of the Court. The order gave Mr. Jensen the charge to review fees and costs, and the charge to make a recommendation to the Court as to payment of such fees and costs. The Court specifically stated in that order:

> No fees will be approved for reimbursement of costs or unpaid costs and expenses until specifically recommended by the master and approved by the Court. Mr. Jensen is charged with the duty both to be fair to those requesting payment, and to function as a fiduciary for the purpose of preserving the maximum estate to the depositor group.... (emphasis added)

In that decision the Court calculated attorney's fees, as to the maximum amount to be awarded, based from a pool of $29 million and the Court reserved a 20% fee, or $5.8 million. The Court analyzed the criteria contained in Rule 1.5 of the Rules

of Professional Conduct, and compared counsel's performance to the standards therein stated.

At that time the Court did not have a truly adversarial situation as to counsel fees, nor did the Court have from counsel the input now provided from the Special Master. The Court privately expressed to class counsel, Mr. Misuraca, the Court's concerns about the information provided by counsel to which Mr. Misuraca in his argument took exception, if not umbrage.

The Court would note that in no place did counsel for the plaintiffs provide the Court with an adequate analysis of the cases and the relevant law wherein judges prior to the undersigned have had to make similar decisions as to an appropriate basis for an award of attorney's fees. This Court was particularly concerned that it was not provided with a careful analysis of the information contained in the following cases: In re: Wicat Securities Litigation, Civ. No. 83-1117G, 671 F.Supp. 726 (D. Utah 1987); Pennsylvania, et al v. Delaware Valley Citizens Council for Clean Air, et al., No. 85-5, 107 S.Ct. 3078 (1987); or even of the case of Gamble v. Wells, 450 So.2d 850 (Fla. 1984), of importance as to the issue of legislatively set fees.

On December 6, 1988, the Court signed an Order prepared by the plaintiffs' attorneys which in paragraph 3 authorized

$5,220,000.00 be paid immediately to the plaintiffs' attorneys.

Thereafter and prior to any such payment, on December 16, the Court entered an Order retaining 33%, or $1,914,000.00 from the total amount of $5.8 million. The Court consistently advised the Court's Special Master that all fees and costs were subject to review due to the fact that the Court felt continuing concern about the absence of an adequate adversarial process in relation to the review of fees and costs being requested.

Based upon the more recent pleadings filed by the attorneys for the plaintiffs and by their own retained counsel, it became apparent to this Court that the attorneys were taking the position that they did not wish to have the Master review the propriety of their fees and costs. On July 5, 1989, this Court issued a Minute Entry specifically requesting the Special Master ". . . to inquire into all costs and fees, including the attorney's fees and costs as presented to the Court." (Emphasis added). The Court further said, "If Mr. Jensen, as to the scope of his authority to examine payments or claims from the depositors' funds is to err, he is to err on the side of expanded examination of the fees and costs." If not previously made clear, it should then have become abundantly clear tc

counsel that the Court remained continually concerned about the focus on all fees and costs including attorney's fees that were being assessed.

The Court further on July 7, in an additional Minute Entry, considering the scope of the hearing set for July 17, stated, "Counsel are directed to address themselves to the substance of and propriety of the requested fees and costs before the Master and before the Court on the now scheduled and pending interviews and hearing dates."

On July 17, 1989, at the time of the hearing, the Court inquired of Mr. Misuraca not less than five different times to focus his attention and his argument on ". . . the matters of substance. . . " as to why the plaintiffs' attorneys should be entitled to the fees they were then requesting.

During the whole of that argument Mr. Misuraca never adequately addressed the basis or propriety for setting the amount of fees and costs to all claimants nor did he address whether the Master's recommendations were or were not appropriate. His continued challenge was to the Court and the Master as to their respective qualifications or judgment.

The Court through the direct efforts of the Master learned that there existed substantial literature and decisional law as to fee settings. The cases showed that the Court could look to setting of "reasonable" hourly rates for services rendered.

Those rates could be based on local rates charged; attorney's experience; examination and review of the type of hours spent (including hours that may have been duplicated and/or for review of "raw" time hours for their "hard" or "soft" quality); and many other factors.

The Court could further review the magnitude and complexity of the litigation; the quality of the representation; the nature of the attorneys' and other claimants' agreements as to the representation (i.e., contingent or not); the risks assumed by the parties and counsel; the reaction of the class to the settlement and fees; additionally the Court could look to some of the factors of judicial economy in resolving the suit.

In addition to the substantive factors giving rise to a determination of the reasonableness of the fee, the Court notes with approval the language in the plurality majority opinion of the United States Supreme Court in Pennsylvania v. Delaware Valley Citizens' Council, cited above, at p. 3086, wherein the Court said it chose ". . . to 'err on the conservative side in dealing with any fee question' rather than 'contribute unnecessarily to the overpricing of litigation in this or any other court.'"

As a result of the attitude of plaintiffs' counsel and the apparent claim, that they misunderstood the breadth of the Court's request of the Master, the Court hereby withdraws all prior Orders relating to attorney's fees as having been improvidently entered or in the alternative amends the same as having been interim orders since there was, at that time, insufficient information and analysis to make an appropriate final decision. Thus the Court herein makes its final decision.[1]

In order to avoid further criticism of the Special Master and the Court, the Court has conducted its own review and

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[1] Class counsel has criticized the Court and the Special Master. However, it is noted that at a minimum, the Special Master has brought to the Court's attention that even the limited information available to the Court prior to entering the previous Orders in this case regarding attorney's fees was inaccurate and incomplete. For example, class counsel had cited a Third Circuit opinion in support of its assertion that a multiplier of 4.0 of the hours expended was common. Not only did the Special Master bring to the Court's attention that the Third Circuit Court's decision had been reversed by the United States Supreme Court, but the Master also pointed out that even the Third Circuit opinion itself provided for a multiplier in its case of only 2.0, and that was allowed only on a limited portion of the hours claimed. The 4.0 claim of the class counsel was in error. The Special Master's review of the other costs has also assisted this Court. This assistance was further confirmed by the recent adoption by the DOIT group of the master's recommendation as to future cost accounting and record keeping.

evaluation of the materials presented, and has drawn its own Memorandum Decision and Order.

Common fund cases such as this case always require the Court's determination of the reasonableness of the compensation of those who participated in the creation of the fund. When a common fund is created by a judgment or settlement of the class litigation, the beneficiaries to the fund, when they are determined to be members of the "class," are entitled to a proportionate share of the fund. Expenses directly benefiting the class are first paid from the fund under the direction of the Court. Determining a reasonable attorney's fee is an obligation of the Court, and is anticipated by class counsel. There can be no doubt in this case that class counsel anticipated the Court would make such a determination. Class counsel's agreement with the class representatives acknowledged this, and Rule 23 of the Utah Rules of Civil Procedure requires it.

It has been said that "success has a thousand fathers, while failure is a bastard." Thus, it is not surprising that each person with any relationship to the creation of the common fund would press upon the Court the singular contribution of that person and the merit of the full payment of that person's claimed costs or fees. In the instant case, the Court sought the services of a Special Master to assist the Court in sorting

The Special Master has called to the attention of the Court a considerable body of law on the subject. Except for certain Utah federal cases, substantially all such law has arisen outside the State of Utah, and is found in the published opinions of other courts. Relevant and informative studies, reports and legal publications have also been cited to the Court. Not unexpectedly, much of the law and studies cited by others differ from the law and conclusions cited initially by class counsel.

The Court has now reviewed the law cited to the Court, including the decision of the U.S. District Court for the Northern District of California, entitled In re Activision Securities Litigation, Civ. No. C83-4639 (N.D. Cal., Oct. 3, 1989) which was delivered to the Court by class counsel on October 11, 1989; the Court has also reviewed the full record in this case. Class counsel and other service providers submitted voluminous documentation in support of their requests. The Court's Special Master reviewed such documentation and discussed the same with the interested persons. The Special Master also visited the offices of DOIT, and Research Associates, and conducted certain conferences and hearings. The Court has reviewed the Master's interim and final reports, and has received and reviewed considerable supplemental documentation and information, including that provided to the Court by class counsel at and before a hearing on July 17, 1989.

In order to determine a reasonable fee, the Court has weighed several factors. Those factors include, but are not limited to review of Rule 1.5 of the Rules of Professional Conduct promulgated by the Utah Supreme Court, and other factors previously mentioned. The Court has considered the Agreement for Settlement of Litigation, the Thrift Settlement Financing Act, and the additional matters suggested in the Special Master's final report, dated July 14, 1989, and the appendix thereto. In particular, on the issue of evaluation of skills and competence of counsel, the Court finds based in part on the hearing of July 17, 1989, and a review of the record, that counsel's court performance does not merit exceptional recognition.

The Court suggests that class counsel's reported hours submitted to the Court were higher than reasonable hours, and the Court has noted certain discrepancies in such reported hours. To the extent a "lodestar" multiplier is applicable to this case, the Court finds that the most appropriate and commonly used lodestar is far lower than the 4.0 suggested by class counsel, and would approach a lodestar factor of 1.5 to 2.0. This lower lodestar also should be applied to the base of efficient hours worked, which the Court finds based on the

record and the Court's experience is lower than the hours initially submitted by class counsel. A lodestar multiplier of 2.0 here, applied to all of the hours now submitted by class counsel, and at the rate suggested by counsel, would produce an attorney's fee of $3.6 million.

Based upon the information presented to the Court, the Court also finds it appropriate to consider the percentage of the total common fund to be used for class counsel fees when determining a reasonable fee. A study of 206 common fund class action cases involving over $2.3 billion in recoveries was called to the Court's attention in the appendix to the Memorandum of Points and Authorities submitted on behalf of Research Associates. The average award for those cases computing both fees and costs combined was 13.2%. In this case counsel bore little or no risk on costs so on that basis this case could justify an even lower percentage applied to fees only.

At the hearing on July 17, 1989, class counsel avoided the Court's requests to give the Court substantive information to help in determining a reasonable fee, preferring rather to employ his time in a rebuke of the Court and an attack on the Court's Special Master. The Court rejects the arguments advanced by class counsel in such a direction. It is the Court's view that Mr. Jensen was well-qualified to accept and

discharge the Court's assignment as special master and did so with diligence and competence. His strength of character in fulfilling this difficult assignment is exemplary. His service to the class members has been of considerable value, and he is commended by the Court for his manner, methods and thoroughness in the discharge of his duties. Since Mr. Jensen's qualifications were challenged, the Court notes a brief footnote as to some of his achievements.[2]

The ultimate determination in this case must be the Court's, and the Court must assume responsibility for its views. Thus, the Court awards fees as follows:

1. The Court calculates class counsel fees based on a combination of the above reasoning and awards class counsel a

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[2] Mr. Jensen holds J.D. and M.B.A. degrees from Columbia University. He served as a law clerk to Judge David T. Lewis, Chief Judge of the Tenth Circuit U.S. Court of Appeals and is the former General Counsel and Secretary of Dictaphone Corporation in Rye, New York. Prior to working for Dictaphone, he also served as in-house counsel for Ethyl Corporation and Echlin Manufacturing Company. He has employed outside counsel in literally hundreds of matters and has reviewed costs and fees therein. He has been admitted to practice law in Connecticut and Virginia as well as Utah, and is a third generation Utah lawyer. In 1985, he served as chief financial officer of Cericor, Inc., which, having sold its assets to Hewlett-Packard, distributed over thirty million dollars to its shareholders. His several written reports in this matter exceed 140 pages and demonstrate a thorough review of the law and facts by a skilled lawyer/master addressing a difficult matter.

total amount of $4,250,000.00. The Court finds this amount to be a reasonable fee in the circumstances.[3]

2. The Court awards to each of the service providers as follows and adopts the recommendation of the Special Master, except where otherwise stated:

Service Provider	Costs Awarded
Research Associates [4]	$ 375,000
Essig, Dansie & DeKay	107,240
Edgar, Dunn & Conover	65,810
Stroock & Stroock & Lavan	21,930
Economic and Planning Systems	24,990
DOIT Board	12,350
MBCCP (Misuraca)	102,690
Haley & Stolebarger	39,350

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[3]The Court notes that a detailed review of the actual hours submitted and an evaluation of their respective weight has not been thoroughly pursued because of the Court's belief that such an analysis is only one of the many relevant factors considered in arriving at the Court's finding of a reasonable fee in this case. However, if further evaluation is required in the future, this Court reserves for future consideration a more detailed study of the time records of class counsel. The Court finds that counsel has completed or will shortly have completed all matters required of counsel in relation to the partial settlement and thus the requirement of a hold back is no longer needed.

[4] The Court has reviewed all matters submitted by this service provider and finds that the number of hours recorded were excessive. The figure found by the Court applies a reduction in hours expended and yet reflects the value added by this service provider.

3. All amounts previously paid to counsel and service providers are to be deemed an interim payment in advance of the final Order as herein established, and are to be credited against such total payment. Without waiver of appeal rights which remain intact, acceptance of the payments by all service providers shall be deemed to be a certification that additional remuneration for such services will not be sought by such service provider from any member of the class, from class counsel, or any third person. Final payments by the special master Arthur Andersen shall so provide by restrictive endorsement.

4. The Court further finds that since there have been substantial delays in ultimately paying all fees and costs as herein ordered, that the counsel and service providers are entitled to an additional administrative cost akin to interest. The administrative cost is to be calculated on the basis of first determining the amount due and owing and unpaid to counsel or the service provider, and second, adding an amount generally equivalent to the average amount earned on the invested common fund calculated from December 22, 1988 until payments in full are made. This determination is to be made by the Court's Special Master, Arthur Andersen.

5. Consistent herewith, the Court requests that its master Arthur Andersen promptly prepare checks and make

distribution of the remaining amounts due to class counsel and the service providers for all services rendered through December 1, 1988.

6. Special Master James U. Jensen is instructed to deliver a copy hereof to the interested parties and persons.

Dated this 31st day of October, 1989.

DAVID S. YOUNG
DISTRICT COURT JUDGE

DELIVERY CERTIFICATE

I hereby certify that I delivered a true and correct copy of the foregoing Memorandum Decision, to the following, this 31 day of October, 1989:

James U. Jensen
Special Master
19 W. South Temple, Suite 700
Salt Lake City, Utah 84101

C Porter

APPENDIX D

Agreed Statement in Lieu of Record on Appeal

JACKSON HOWARD (1548),
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S:haley-st.nn
Our File No. 19,397

Attorneys for Class Counsel

IN THE SUPREME COURT OF THE STATE OF UTAH

DOLLY PLUMB, et al.,	:	
Plaintiffs-Appellees,	:	
vs.	:	AGREED STATEMENT IN LIEU OF RECORD ON APPEAL
THE STATE OF UTAH, et al.,	:	
Defendants.	:	
MALCOLM A. MISURACA, HALEY & STOLEBARGER, DOUGLAS B. PROVENCHER, and BEYERS, COSTIN & CASE,	:	Case No. 900012
Appellants.	:	

Appellants, Malcolm A. Misuraca, Haley & Stolebarger, Douglas B. Provencher, and Buyers, Costin & Case (hereafter "Class Counsel"), by and through their attorney Jackson Howard, and respondents, the plaintiff depositor class (hereinafter "Appellees"), by and through their counsel on appeal, Craig G. Adamson and Stewart M. Hanson, Jr., stipulate and agree to the following statement in lieu of a record on appeal. The parties further agree, however, that the entire text of any document referred to herein shall be deemed a part of the record on appeal.

1. The Appellees in this action are the representative plaintiffs and the depositor class consisting of approximately seven thousand households holding approximately seventeen thousand accounts in five failed thrift institutions in the State of Utah. The Appellees seek recovery of their lost deposit accounts. The Appellees have not had access to the funds in their accounts since July 31, 1986.

2. Subsequent to the failure of the thrift institutions, Appellees, through their representatives, employed Class Counsel to represent them. This occurred after an extensive search and interview involving a number of prospective attorneys. After negotiations between Class Counsel's and Appellees' representatives, a written attorney fee agreement was reached between Class Counsel and Appellees. The written attorney fee agreement provided, among other things, that Class Counsel would be awarded a reasonable attorney fee to be determined by the trial court and that the parties agreed that a reasonable fee would be between twenty and forty percent of the recovery.

3. Thereafter, one hundred percent of the class members responding (approximately eighty percent of the class polled) expressly consented to the employment of class counsel.

4. Class Counsel filed this action on behalf of Appellees on July 20, 1987.

5. On October 24, 1988, Appellees filed their Motion for Certification of Class Action which sought an order certifying the class for settlement purposes only. The motion was stipulated to the principal defendants and was granted by orders entered October 31, 1988 and November 2, 1988.

6. In connection with their representation of Appellees, Class Counsel worked and negotiated with the legislature of the State of Utah, which initially resulted in t

appointment of a task force to study the claims against the State, and ultimately, after numerous appearances by Class Counsel before the task force, the trial court, and after many months of intense negotiations, resulted in a settlement of this case between the class, the State of Utah, California Union Insurance Company (the State's insurer), and certain other parties including the Trustees Loan Guarantee Corporation and thrift and loan institutions that became federally insured.

7. Legislation implementing the settlement was signed by Governor Norman Bangerter on October 11, 1988, and is codified at Utah Code Ann. §§ 7-21-1 to -10 (Supp. 1989).

8. The settlement contained essentially the following terms and features:

a. The State of Utah paid $10 million outright to the depositors from the general fund.

b. The State's insurance carrier, California Union Insurance Company ("Cal Union"), paid an additional $19 million cash to the settlement.

c. The State advanced to the depositors an additional $15 million from the general fund in exchange for a share in future receipts from the liquidation of the assets of the five failed thrifts and the Industrial Loan Guarantee Corporation.

d. The parties agreed that up to $1 million from the settlement could be set aside by the trial court to create a sinking fund for expenses of the future class action litigation.

e. The State and California Union agreed to pool their claims against other defendants with those of Appellees agreeing to share the first $5 million recovered, one-half to the appellees and one-half to the state with recoveries over $5 million being distributed

one-third to the Appellees, one-third to the State, and one-third to the insurance carriers, after deducting costs of litigation other than attorney fees. Utah Code Ann. § 7-21-4 (Supp. 1989); Motion for Preliminary and Final Approval of the Partial Settlement of Class Action; Preliminary and Final Approval of Attorneys' Fees and Costs; Preliminary and Final Approval of Amounts to Reimburse Depositors and Set-Aside Funds for Future Litigation, Costs and Expenses (hereinafter "Motion for Preliminary Approval"), filed October 25, 1988.

9. At a hearing held October 31, 1988, the trial court granted a Motion for Preliminary Approval and approved a form of ballot. Formal orders approving the form of ballot and exclusion (opt out) forms, and the form of published notice to the class, were entered on October 31, 1988 and November 2, 1988.

10. Documents outlining the proposed settlement were thereafter mailed to all known depositors and published in various newspapers. Included in the materials thus mailed and published was a notice that Class Counsel intended to request an attorney fee of $7.25 million (calculated as 25% of the $10 million portion of the recovery paid from the State general fund plus the $19 million portion paid by the State's insurers).

11. The class overwhelmingly voted to accept the settlement, which had been submitted to the class together with notice that Class Counsel was requesting a fee of $7.25 million; 99.99% of the vote on the settlement was in favor of its acceptance.

12. Only five depositors filed objections to the requested attorney fees, consisting of a letter filed November 10, 1988, a Notice of Objection to Confirmation of Disclosure Statement and Settlement filed November 21, 1988, a letter filed November 21, 1988, and two additional objections to attorneys' fees filed November 23, 1988.

13. A hearing on the proposed settlement and request for attorney fees was held November 30, 1988. In connection with that hearing, Class Counsel submitted a Supplemental Memorandum in Support of Attorneys' Fees for Class Counsel. That memorandum discussed the contingent fee contract, the Lodestar approach, the percentage of fund approach, and the appropriate factors to be considered in determining fees. The memorandum included nearly two hundred pages of addendum detailing time expended by counsel on the case. Class Counsel also submitted an affidavit of Senator Fred W. Finlinson, sponsor of the bill that produced the settlement, who supported the fee request of Class Counsel. A separate affidavit was submitted by Carman Kipp, counsel to the State of Utah, in which Mr. Kipp stated that the fee request of $7.25 million was not unreasonable. Ray R. Christiansen, co-counsel to State of Utah stated his opinion that a fair fee would be in the range of 3.5 to 5 million dollars. Counsel for the legislature Ms. Gaye Taylor argued in favor of a fee of 1.5 million. Malcom A. Misuraca speaking for class counsel addressed the court in rebuttal and answered the questions posed by the court. Mr. Gary Stratton, President of the depositors organization (D.O.I.T.) reiterated that it was the depositors collective view that a fair fee would be 20% to 40% of the $29,000,000.00 portion of the recovery. Many other depositors were present but no other depositor addressed the court. The trial court took the matters under advisement following the hearing.

14. On December 5, 1988, the trial court issued its memorandum decision, and on December 6, 1988, an order, which, among other things, approved the settlement, awarded Class Counsel attorney fees of $5.8 million (20% of the $29 million portion of the recovery), and appointed a special master, James U. Jensen "for the purpose of reviewing request for cost

reimbursements . . . ." retaining those costs reimbursement requests made by expert witnesses. lobbyists, and others under advisement.

15. On December 16, 1988, the special master submitted his First Interim Report, which was adopted by the trial court, without notice or hearing, by order entered the same day. The December 16 order modified the trial court's December 6 order by withholding 33% of the attorney fee award and concluding that a substantial portion of the costs and expenses of litigation should be borne by Class Counsel.

16. The special master's Second Interim Report, relating to the special master Arthur Anderson & Company, was submitted in February, 1989.

17. The Third Interim Report and Recommendation to Judge David S. Young by Special Master, James U. Jensen ("Third Report") was submitted on May 2, 1989. The Third Report recommended reduced cost reimbursements to all providers with the exception of D.O.I.T. (a private corporation representing the depositors) and one private provider, whose requests were recommended to be reimbursed in full. The Third Report also recommended that the trial court's attorney fee award of $5.8 million be reduced by one-third (approximately $1.9 million) to approximately $3.9 million.

18. Prior to issuing the Third Report, Special Master Jensen held no hearings, and took no evidence on the record. Special Master Jensen acknowledged in the Third Report and in subsequent proceedings that his "investigation" and fact finding functions were conducted entirely off the record and without notice to any parties.

19. On February 14, 1989, the trial court entered an "Order of Dismissal and Order With Respect to Amended Pleading which dismissed all pending claims against defendants subject to leave to file an amended complaint.

20. On March 2, 1989, plaintiffs filed a Motion to Create Reserve for Litigation Expenses, which was granted by order entered June 8, 1989.

21. On May 15, 1989, Jackson Howard, for Howard, Lewis & Petersen, entered an appearance for Class Counsel with respect to the fee dispute, and filed a Motion to Fix Time for Objection or Other Response to Master's Third Interim Report and Recommendation together with a supporting memorandum. The motion sought, among other things, an order setting a schedule and deadline for conducting discovery with respect to the Third Report.

22. On June 12, 1989, the trial court entered a minute entry denying Class Counsel's request to fix a schedule for discovery and to respond to the Third Report, and directing that no discovery be permitted. The minute entry further set a hearing for July 17, 1989, for review of the Third Report, and provided that all additional information relative to the Third Report must first be submitted to Special Master Jensen and that Special Master Jensen would schedule the presentation before the trial court.

23. On June 14, 1989, Special Master Jensen sent a letter to Class Counsel and other interested persons enclosing the minute entry by Judge Young dated June 12, 1989, and giving directions for requesting time on the hearing scheduled for July 17, 1989.

24. On June 15, 1989, Class Counsel filed their "Motion to Strike Reports of Special Master and for Other Relief, together with a supporting memorandum.

25. On July 3, 1989, Class Counsel filed a Motion for Stay, together with a supporting memorandum, which sought an order staying all proceedings before the Special Master until the challenges to his jurisdiction, authority, methods and "findings" could be resolved. Class Counsel also filed a Request for Oral Argument in connection with the motion.

26. On July 5, 1989, the trial court sua sponte entered three minute entries. The first purported to "clarify" the direction and authority of Special Master Jensen. The second minute entry denied Class Counsel's challenges to the appointment and authority of the special master. The third minute entry denied motions by Craig Adamson, attorney for the depositors, challenging the special master's reports.

27. On July 8, 1989, and at the request of Class Counsel, a "hearing" was held before Special Master Jensen. Class Counsel had requested approximately two days to present the necessary evidence on Class Counsel's request for attorney fees. Special Master Jensen responded that only two hours would be permitted, but that testimony could be submitted by proffer. At the July 8 hearing, Class Counsel proffered evidence from several expert witnesses, each of whom was competent to testify and was knowledgeable concerning class action litigation and contingent fee litigation, and each of whom would have testified that the $5.8 million fee requested by Class Counsel was less than a reasonable fee, or was the minimum fee which would be reasonable.

28. The hypothetical questions submitted to the expert witnesses accurately se forth the relevant facts.

29. On July 13, 1989, Jackson Howard filed a motion for continuance of th scheduled hearing before Judge Young on July 13, asserting that Mr. Howard was the involved in a previously scheduled jury trial in Federal Court which was running longer tha expected and which would continue through July 17. Mr. Howard had advised Judge Your of the conflict several days previously, but at the suggestion of the court the date remain unchanged pending developments within the federal case which might obviate the need f changing the hearing date.

30. The trial court denied the motion for a continuance and instead engaged in a telephone conversation with Judge David Sam of the United States District Court for the District of Utah wherein Judge Sam agreed to allow Mr. Howard to leave the jury trial in Judge Sam's court for the purpose of attending Judge Young's hearing. Judge Sam indicated that he would not allow Mr. Howard to leave until 11:00, which meant that he would not be able to arrive at Judge Young's court until approximately 11:30, but Judge Young refused to alter the starting time of the hearing from the scheduled 10:00 a.m.

31. On July 14, 1989, Special Master Jensen filed his Final Report on Costs and Fees of Class Counsel and Service Providers to Judge David S. Young by Special Master James U. Jensen (hereinafter "Final Report"). The Final Report, in essence, withdrew the recommendations made in the Third Report, and instead "advised" the court as to the factors which could properly be considered in fixing a reasonable attorney fee. The report did not make any findings concerning the matters which had been proffered to the special master at the hearing on July 8, nor make any findings on any other issues.

32. On July 17, 1989, Judge David S. Young held a hearing in his courtroom commencing at 10:00 a.m. Craig S. Adamson presented arguments on behalf of the depositors, and stated that is was the position of the D.O.I.T. Board and the representative plaintiffs that the December 5 and 6 award of attorney fees should not be reopened and reexamined. Mr. Adamson further objected to the proceedings before the Master on the basis that the Master had not provided for the taking of evidence on the record with an opportunity to the parties to cross examine.

33. Judge Young stated at the July 17th hearing that he had received numerous letters from depositors which were not part of the record and which he would not disclose to counsel.

34. Mr. Misuraca presented arguments at the July 17th hearing relating to the qualifications, appointment and methods of the Master.

35. Mr. Howard, attorney for Class Counsel, was not present at the beginning of the July 17th hearing, and was not able to attend until after the hearing was more than half way through, and therefore, heard only the last of Mr. Misuraca's argument. Further, it was not intended by Mr. Howard that Mr. Misuraca argue the case, but because Mr. Howard had not arrived when his portion of the argument occurred, Mr. Misuraca attempted to fill in until Mr. Howard arrived. As a result, and because of extended exchange between Mr. Misuraca and the court Mr. Howard had approximately 15 minutes to address the issues before the courts pre-announced recess time of 12 noon.

36. Mr. Malcolm A. Misuraca also presented arguments, and proffered evidence that Carman Kipp, if called to testify, would testify that the initial award of $5.8 million was a reasonable award.

37. Judge Young took the matter under advisement following the hearing.

38. Following the hearing, Judge Young ordered a transcript of the argumen presented at the July 17th hearing by Mr. Misuraca, but ordered no other portions. Th portion of the transcript ordered by Judge Young was filed on August 22, 1989.

39. On October 31, 1989, Judge Young entered his Memorandum Decision fro which this appeal is taken.

40. Copy of the Memorandum Decision were mailed to all parties by the Special Master, and a Certificate of Service was filed on November 6, 1989.

41. On November 21, 1989, Class Counsel and the Plaintiff Class filed a Motion to Disqualify Judge Young, which motion was heard by Judge Daniels on December 27, 1989, and denied by Order entered on January 16, 1990.

42. A transcript of the remaining portions of the July 17th hearing was prepared at the request of plaintiffs and filed with the Court.

43. A transcript of the hearing held before the Special Master on July 8, 1989, was transcribed and may be considered as part of the record on appeal.

DATED this 3rd day of May, 1990.

JACKSON HOWARD, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Class Counsel

DATED this _____ day of May, 1990.

STEWART M. HANSON, JR.

DATED this _____ day of May, 1990.

CRAIG W. ADAMSON

APPENDIX E

Utah R. Civ. P. 53.

Rule 53. Masters.

(a) **Appointment and compensation.** Any or all of the issues in an action may be referred by the court to a master upon the written consent of the parties, or the court may appoint a master in an action, in accordance with the provisions of Subdivision (b) of this rule. As used in these rules the word "master" includes a referee, an auditor, and an examiner. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain his report as security for his compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

(b) **Reference.** A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall, in the absence of the written consent of the parties, be made only upon a showing that some exceptional condition requires it.

(c) **Powers.** The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in the Utah Rules of Evidence for a court sitting without a jury.

(d) **Proceedings.**

(1) **Meetings.** When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make his report. If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in his discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) **Witnesses.** The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, he may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45.

(3) **Statement of accounts.** When matters of accounting are in issue before the master, he may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as he directs.

(e) **Report.**

(1) **Contents and filing.** The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. He shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(2) **In non-jury actions.** In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(3) **In jury actions.** In an action to be tried by a jury the master shall not be directed to report the evidence. His findings upon the issues submitted to him are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

(4) **Stipulation as to findings.** The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(5) **Draft report.** Before filing his report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

(f) **Objections to appointment of master.** A party may object to the appointment of any person as a master on the same grounds as a party may challenge for cause any prospective trial juror in the trial of a civil action. Such objections must be heard and disposed of by the court in the same manner as a motion.

(Amended, effective Jan. 1, 1987.)